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FOR
COURTS-MARTIAL
UNITED STATES

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KEY TO REFERENCES, CITATIONS, AND ABBREVIATIONS

The Manual for Courts-Martial, United States, 1951, may be cited as "MCM, 1951."

In the manual the Uniform Code of Military Justice is referred to as "the code."

The terms defined in Article 1 of the code are used throughout the manual in the sense of the respective definitions unless the context indicates to the contrary.

In the manual references and citations appear in the following forms:

Reference or citation	*In open text*	*In parentheses*
An article of the code	Article 15	(Art. 15)
A paragraph of the manual	5*a* (2)	(5*a* (2))
Plural paragraphs of the manual	5*a* (2), (5) and (6), and 5*b* (3)	(5*a* (2), (5) and (6), 5*b* (3))
A paragraph of the manual and an article of the code	9 and Article 2	(9; Art. 2)
Plural articles of the code	Articles 65, 66, and 69	(Arts. 65, 66, 69)
A chapter of the manual	chapter II	(ch. II)
A paragraph and an appendix of the manual	32*f* (1) and appendix 3	(32*f* (1); app. 3)
An appendix of the manual	appendix 2	(app. 2)
Plural appendices of the manual	appendices 5 and 6	(apps. 5, 6)

EXECUTIVE ORDER 10214

PRESCRIBING THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951

By virtue of the authority vested in me by the act of Congress entitled "An act to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice," approved May 5, 1950 (64 Stat. 107), and as President of the United States, I hereby prescribe the following Manual for Courts-Martial to be designated as "Manual for Courts-Martial, United States, 1951."

This manual shall be in force and effect in the armed forces of the United States on and after May 31, 1951, with respect to all court-martial processes taken on and after May 31, 1951: *Provided*, That nothing contained in this manual shall be construed to invalidate any investigation, trial in which arraignment has been had, or other action begun prior to May 31, 1951; and any investigation, trial, or action so begun may be completed in accordance with the provisions of the applicable laws, Executive orders, and regulations pertaining to the various armed forces in the same manner and with the same effect as if this manual had not been prescribed: *Provided further*, That nothing contained in this manual shall be construed to make punishable any act done or omitted prior to the effective date of this manual which was not punishable when done or omitted: *Provided further*, That the maximum punishment for an offense committed prior to May 31, 1951, shall not exceed the applicable limit in effect at the time of the commission of such offense: *And provided further*, That any act done or omitted prior to the effective date of this manual which constitutes an offense in violation of the Articles of War, the Articles for the Government of the Navy, or the disciplinary laws of the Coast Guard shall be charged as such and not as a violation of the Uniform Code of Military Justice; but, except as otherwise provided in the first proviso, the trial and review procedure shall be that prescribed in this manual.

Harry Truman

THE WHITE HOUSE,
February 8, 1951

Chapter I

MILITARY JURISDICTION

SOURCES—EXERCISE

1. SOURCES.—The sources of military jurisdiction include the Constitution and international law. International law includes the law of war. The specific provisions of the Constitution relating to military jurisdiction are found in the powers granted to Congress, in the authority vested in the President, and in a provision of the fifth amendment.

2. EXERCISE.—Military jurisdiction is exercised by a belligerent occupying enemy territory (military government); by a government temporarily governing the civil population of a locality through its military forces, without the authority of written law, as necessity may require (martial law); by a government in the execution of that branch of the municipal law which regulates its military establishment (military law); and by a government with respect to offenses against the law of war.

The agencies through which military jurisdiction is exercised include:

Military Commissions and Provost Courts for the trial of offenses within their respective jurisdictions. Subject to any applicable rule of international law or to any regulations prescribed by the President or by any other competent authority, these tribunals will be guided by the applicable principles of law and rules of procedure and evidence prescribed for courts-martial.

Courts-Martial—General, Special, and Summary—for the trial of offenders against military law and, in the case of general courts-martial, of persons who by the law of war are subject to trial by military tribunals.

Commanding Officers and Officers in Charge exercising nonjudicial powers under Article 15.

Courts of Inquiry for the investigation of any matter referred to such court by competent authority. See Article 135. Under the provisions of Article 140, the authority to promulgate regulations for the governance of courts of inquiry is hereby delegated to the Secretaries of the Departments.

Chapter II

COURTS-MARTIAL

CLASSIFICATION—COMPOSITION

3. CLASSIFICATION.—Courts-martial are classified as general, special, and summary courts-martial (Art. 16).

4. COMPOSITION.—*a.* ***Who may serve as members.***—Any officer on active duty with the armed forces shall be eligible to serve on courts-martial (Art. 25*a*). Any warrant officer on active duty with the armed forces shall be eligible to serve on general and special courts-martial for the trial of any person other than an officer (Art. 25*b*). Any enlisted person on active duty with the armed forces shall be eligible to serve on general and special courts-martial for the trial of any enlisted accused who has personally requested in writing, prior to the convening of the court (61*i*), that enlisted persons serve on it (Art. 25*c*).

No distinction exists among the various classes of officers or of warrant officers and enlisted persons on active duty with the armed forces, but the term "active duty" as herein used refers to the status of being in the active Federal service of any of the armed forces under a competent appointment or enlistment or pursuant to a competent muster, order, call, or induction. Retired personnel of any Regular component and personnel of any Reserve component of the armed forces are eligible to serve on courts-martial only when they are in an active duty status. Personnel of the Coast and Geodetic Survey and Public Health Service are eligible to serve on courts-martial only when they are on active duty and assigned to duty with an armed force.

No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case (62*f*; Arts. 1 (11), 25*d* (2)) or, in case of a rehearing or a new trial, if he was a member of the court which first heard the case (62*f*; Art. 63*b*). No enlisted person may sit as a member of a court-martial for the trial of another enlisted person who is a member of the same unit (Art. 25*c* (1)). The word "unit" as herein used shall mean any regularly organized body as defined by the Secretary of a Department, but in no case shall it be a body larger than a company of the Army, a squadron of the Air Force, or a ship's crew, or a body corresponding to one of them (Art. 25*c* (2)).

Departmental definitions made pursuant to Article 25*c* (2) are as follows:

Army.—A "unit" of the Army in the sense of Article 25*c* is a company, battery, troop, detachment, or other organization of the Army for which a separate morning report is prepared.

Navy and Coast Guard.—A "unit" of the Navy or the Coast Guard in the sense of Article 25*c* is a ship, company, detached command, or other organization for which a separate unit personnel diary is prepared.

Air Force.—A "unit" of the Air Force in the sense of Article 25*c* is a squadron or other organization of the Air Force for which a separate morning report is prepared.

Arrest, confinement, or suspension from rank renders a person ineligible to sit as a member of a court-martial. For other cases in which a person should not sit as a member of a general or special court-martial and for grounds for challenge, see 62*f*.

The availability of certain persons for detail may be restricted by departmental regulations.

b. ***Number of members.***—General courts-martial shall consist of a law officer and any number of members not less than five. The law officer is not a member of the court. Special courts-martial shall consist of any number of members not less than three. Summary courts-martial shall consist of one officer (Art. 16).

c. ***Rank of members.***—An officer may be tried only by a court-martial composed of officers. A warrant officer may be tried by a court-martial composed of officers or of officers and warrant officers (Art. 25*a*, *b*). When it can be avoided, no person in the armed forces shall be tried by a court-martial any member of which is junior to him in grade or relative rank (Art. 25*d* (1)) nor, in the case of an officer, by those below him on the same promotion list. Whenever practicable, the senior member of a general or special court-martial should be an officer whose rank is not below that of lieutenant of the Navy or Coast Guard or captain of the Army, Air Force, or Marine Corps. An enlisted person who has requested in writing that enlisted persons serve on the general or special court-martial which will try his case shall not be tried by a court the membership of which does not include enlisted persons in a number comprising at least one-third of the total membership of the court unless eligible enlisted persons cannot be obtained because of physical conditions or military exigencies. Where such persons cannot be obtained the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained (Art. 25*c* (1)). For example, where the only enlisted persons on duty at an isolated station or on board a ship at sea are members of the same unit (Art. 25*c* (2)) as the accused and no other enlisted persons can be obtained without manifest injury to the service, the convening authority may, in his sound discretion, direct that the trial be held without enlisted members. Mere inconvenience is not a ground for proceeding with a trial without enlisted persons. The detailed written statement appended to the record stating that enlisted persons could not be obtained as members is subject to review when the record of trial is examined under Articles 65, 66, and 69.

Whenever practicable, a summary court should be an officer whose rank is not below that of lieutenant of the Navy or Coast Guard or captain of the Army, Air Force, or Marine Corps.

d. ***Qualification of members.***—When convening a court-martial, the convening authority shall appoint as members thereof such persons as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament (Art. 25*d* (2)).

If it is anticipated that complicated issues of law will be presented before a special court-martial, the convening authority should give consideration to appointing as a member of the court, if practicable, a lawyer qualified in the sense of Article 27*c*. As a general rule the convening authority should not, however, delay the disposition of cases in order to await the availability of such a lawyer. The determination of the convening authority as to practicability shall be final.

e. ***Law officer for general court-martial.***—The authority convening a general court-martial shall appoint as law officer thereof an officer on active duty who is a member of the bar of a Federal court or of the highest court of a State of the United States and who is certified to be qualified for such duty by the Judge Advocate General of the armed force of which he is a member (Art. 26*a*).

The order appointing a general court-martial will expressly state that the law officer is certified as qualified for such duty by the Judge Advocate General of the armed force of which he is a member. See appendix 4 for the form of statement of qualification.

Failure to appoint a law officer of a general court-martial who is qualified as prescribed in Article 26*a* renders any proceeding of such court void.

No person shall be eligible to act as law officer in a case if he is the accuser (Art. 1 (11)) or a witness for the prosecution (63) or has acted as an investigating officer or counsel in the same case (Art. 26*a*). An officer who has served as a member should not be appointed as law officer for a rehearing (92) or a new trial (109, 110) of the same case. Prior participation in the same case as law officer, staff judge advocate, or legal officer to the convening authority may be a ground for challenge for cause. See 62*f*.

f. Appointment of members and law officers from other commands of the same armed force.—The convening authority may, with the concurrence of their proper commander, appoint as members of a court-martial or as law officer of a general court-martial eligible persons of the same armed force who are not otherwise under his command. Concurrence of the proper commander may be oral and need not be evidenced by the record of trial.

g. Appointment of members and law officers from other armed forces.—(1) *General policy.*—Members of courts-martial should be members of the same armed force as the accused. There is no policy restriction on the appointment of law officers from among qualified officers under the command of the convening authority irrespective of the armed force of which such law officers are members. Whenever it is necessary to convene a court composed of members of more than one armed force, at least a majority of the membership of a general or special court-martial sitting for the trial of a case should be members of the same armed force as the accused unless exigent circumstances render it impracticable to obtain such members without manifest injury to the service.

(2) *Appointment of members and law officers from within a joint command or joint task force.*—The commanding officer of a joint command or joint task force who has been specifically empowered by the President or the Secretary of Defense to exercise jurisdiction over personnel of another armed force (13) may, in accordance with the policy stated in 4*g* (1) above, appoint as members of courts-martial or as the law officer of a general court-martial, eligible persons under his command who are members of the same armed force as the accused. When, to avoid manifest injury to the service, it is necessary to appoint members of any other armed forces to serve on such a court-martial, such appointments may be made as an exception to the policy announced in 4*g* (1). The commanding officer of a subordinate joint command or joint task force who has been authorized by the superior commander to exercise reciprocal special and summary court-martial jurisdiction (13) may, subject to similar restrictions, appoint as members of such courts-martial any eligible persons of his command. The superior commander may also make available to such subordinate convening authority other persons who are members of the accused's armed force in order that the court may be constituted in accordance with the policy announced in 4*g* (1).

(3) *Appointment from commands of other armed forces.*—In exceptional circumstances, with the concurrence of the Secretaries of the other Departments concerned, the Secretary of a Department may authorize a convening authority responsible to him to appoint personnel of other armed forces to serve on courts-martial in cases not contemplated by the provisions of 4*g* (2). Such a convening authority may appoint as members of courts-martial, and as law officer of a general court-martial, eligible members of other armed forces from among personnel made available for the purpose by their proper commander. For example, if a separate wing of the Air Force is temporarily based near an overseas naval station, and if the only available officers in the vicinity eligible to act as law officers are law specialists assigned to the naval station, the wing commander may appoint as law officer of a general court-martial for the trial of an airman a law specialist from those made available to him for the purpose by the commanding officer of the naval station, provided the wing commander has been authorized by the Secretary of the Air Force, with the concurrence of the Secretary of the Navy, to appoint naval personnel to serve on courts-martial.

Chapter III

COURTS-MARTIAL

CONVENING AUTHORITIES—APPOINTMENT OF TRIAL COUNSEL, DEFENSE COUNSEL, ASSISTANTS—APPOINTMENT OF REPORTERS AND INTERPRETERS

5. CONVENING AUTHORITIES.—*a.* ***General courts-martial.***—(1) The President of the United States, the Secretary of a Department, and the commanding officers of commands designated in Article 22*a* may convene general courts-martial.

(2) When a commanding officer is designated by the Secretary of a Department pursuant to Article 22*a* (6) or empowered by the President pursuant to Article 22*a* (7) to convene general courts-martial, the appointing order will cite such authorization. See appendix 4 for form.

(3) It is unlawful for an accuser to convene a general court-martial for the trial of the person so accused. When any commander who would normally convene the general court-martial is the accuser in a case, he shall refer the charges to a superior competent authority who will convene the court or designate another competent convening authority to exercise jurisdiction. A superior competent authority may convene the court to try any other case in a subordinate command if he so desires (Art. 22*b*). Thus, if the exigencies of the service interfere with the prompt disposition of cases, a superior competent to convene general courts-martial properly may convene courts for the trial of cases arising in a subordinate command.

(4) An accuser is a person who signs and swears to charges, a person who directs that charges nominally be signed and sworn by another, or any other person who has an interest other than an official interest in the prosecution of the accused (Art. 1 (11)). No person will be ordered to sign and swear to charges if he does not believe the allegations therein to be true in fact to the best of his knowledge and belief. The person who signs and swears to charges is always an accuser. Whether a commander who convened the court is the accuser in other cases is a question of fact. Action by a commander which is merely official and in the strict line of duty cannot be regarded as sufficient to disqualify him. For example, a commander may, without becoming the accuser in the case, direct a subordinate to investigate an alleged offense with a view to formulating and preferring appropriate charges if the facts disclosed by such investigation should warrant preferring charges. The commander may thereafter refer such charges for trial as in other cases.

(5) As Article 22 expressly designates those who have authority to convene general courts-martial, it follows that no one else has this authority and that anyone having this authority cannot delegate or transfer it to another. The authority of a commanding officer to convene general courts-martial is independent of his rank and is retained by him as long as he continues to be such a commander. The rules as to the devolution of command in case of the death, disability, or temporary absence of a commander are stated in departmental regulations.

(6) An officer who has power to convene a general court-martial may determine the cases to be referred to it for trial and may dissolve it, but he cannot control the exercise by the court of the powers vested in it by law. In this connection, see Article 37. He may withdraw any specification or charge at any time unless the court has finally terminated the proceedings thereon by a finding or by a ruling which amounts to a finding of not guilty. See, however, Article 44*c*.

b. ***Special courts-martial.***—(1) Any person who may convene a general court-martial and the commanding officers of commands designated in Article 23*a* may convene special courts-martial. When empowered by the Secretary of the Department concerned, an officer in charge of a command of the Navy or Coast Guard may convene special courts-martial (Art. 23*a* (7)).

(2) The principles stated in 5*a* (2) to 5*a* (6), inclusive, apply to special courts-martial. See Article 23*b* as to accusers.

(3) A squadron, battalion, or corresponding unit or command is "separate" or "detached" when isolated or removed from the immediate disciplinary control of a superior in such a manner as to make its commander primarily the one to be looked to by superior authority as the officer responsible for the discipline of the enlisted persons composing the command. Whenever there is doubt whether a command is detached in the sense of Article 23 the matter, if arising in the Army or the Air Force, will be referred to the officer exercising general court-martial jurisdiction over the command, and if arising in the Navy or the Coast Guard, to the flag or general officer in command or the senior officer present who designated the detachment. Such determination shall be final. The terms "separate" or "detached" are used in a disciplinary sense and are not necessarily limited to what constitutes separation or detachment in a physical or tactical sense. For instance, the commanding officer of a field artillery battalion which is part of an army division, if responsible directly to the division commander for the discipline of the battalion, may appoint special courts-martial even though there is a division artillery commander who controls the battalion in other matters. Also, an air force squadron might be responsible directly to an air force for disciplinary matters although

responsible to a group for its operations. In such a case, the squadron would be separate in the sense of Article 23*a* (4). The power of the squadron or battalion commander to appoint such courts is subject to the power of superior competent authority to reserve to himself the right to appoint special courts-martial for any or all subordinate units and detachments in his command.

(4) A subordinate commander may exercise his power to appoint special courts-martial unless a competent superior reserves that power to himself and so notifies the subordinate.

c. ***Summary courts-martial.***—Any person who may convene a general or special court-martial and the commanding officers of the commands designated in Article 24*a* may convene summary courts-martial. When empowered by the Secretary of the Department concerned, an officer in charge of a command of the Navy or Coast Guard may convene summary courts-martial (Art. 24*a* (4)). Summary courts-martial may, however, be convened in any case by superior competent authority when deemed desirable by him. When but one officer is present with a command or detachment he shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases brought before him (Art. 24*b*), and no order appointing the court need be issued. When more than one officer is present, a subordinate officer will be appointed summary court-martial.

If the convening authority of a summary court-martial or the summary court officer is the accuser of the person or persons to be tried, it is discretionary with the convening authority whether he will forward the charges to superior authority with a recommendation that the summary court be appointed by the latter; but the fact that the convening authority or the summary court officer is the accuser in a particular case does not invalidate the trial.

The principles stated in 5*a* (2), (5) and (6), and 5*b* (3) and (4) apply to summary courts-martial.

6. APPOINTMENT OF TRIAL COUNSEL, DEFENSE COUNSEL, ASSISTANTS.—*a.* ***General.***—For each general and special court-martial the authority convening the court shall appoint a trial counsel and a defense counsel, together with such assistants as he deems necessary or appropriate. No person who has acted as investigating officer, law officer, or court member in any case shall act subsequently as trial counsel, assistant trial counsel, or, unless expressly requested by the accused (61*f* (4); app. 8*a*), as defense counsel or assistant defense counsel in the same case. No person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for the defense act subsequently in the same case for the prosecution (Art. 27*a*). Unless the contrary affirmatively appears of record, a person who, between the time the case has been referred for trial and the trial, has been an appointed counsel or assistant counsel of the court to which the case has been referred, shall be deemed to have acted as a member of the prosecution or the defense as the case may be. A person who has acted for the accused at a pretrial investigation or other proceedings involving the same general matter is ineligible to act thereafter for the prosecution. An accuser, unless expressly requested by the accused (61*f* (4); app. 8*a*), shall not act as defense counsel or assistant defense counsel in the same case.

The power of appointment under Article 27 cannot be delegated.

The general principles of 4*f* and 4*g* (3) are applicable to the appointment of counsel and assistants. The commanding officer of a joint command or a joint task force may appoint any qualified officer of his command as a counsel or as an assistant counsel of a general or special court-martial irrespective of the armed force of which such officer is a member.

b. ***Qualification of counsel of general courts-martial.***—A person who is appointed as trial counsel or defense counsel of a general court-martial shall be a judge advocate of the Army or the Air Force, or a law specialist of the Navy or Coast Guard, who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or shall be a person who is a member of the bar of a Federal court or of the highest court of a State (Art. 27*b* (1)). In addition to this qualification, a person who is appointed as a trial counsel or defense counsel of a general court-martial shall be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member (Art. 27*b* (2)).

The term "judge advocate of the Army or the Air Force" as herein used shall be construed to refer to all officers of the Regular Army appointed in the Judge Advocate General's Corps, all non-Regular officers of any component of the Army of the United States on active Federal duty assigned to the Judge Advocate General's Corps by competent orders, and all Regular Air Force officers belonging to that group of judge advocate officers of the United States Air Force constituting a Judge Advocate General's Department or designated judge advocates by appropriate orders, or non-Regular officers of any component of the Air Force of the United States on active Federal duty designated as judge advocates by appropriate orders or assigned to a Judge Advocate General's Department within the Air Force of the United States. The term "law specialist" as herein used shall be construed to refer to an officer of the Navy or Coast Guard designated for special duty (law).

The order appointing a general court-martial will expressly state the qualification of the trial counsel and the defense counsel as prescribed by Article 27*b*. See appendix 4 for the form of statement of qualification. A statement that counsel is certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member is sufficient to show that the person so certified is fully qualified by reason of legal training or bar membership as prescribed by Article 27*b* (1).

c. ***Qualification of counsel of special courts-martial.***—Any officer not disqualified by reason of prior participation in the same case (6*a*) may be appointed trial counsel or defense counsel of a special court-martial. But if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel must be similarly qualified (Art. 27*c* (1)); and if the trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or of the highest court of a State, the defense counsel appointed by the convening authority shall be one of the foregoing (Art. 27*c* (2)).

The appointing order will expressly state whether trial counsel and defense counsel are or are not legally qualified lawyers in the sense of Article 27*c*. See appendix 4 for forms. Proof of the qualification of judge advocates, law specialists (see 6*b*), and officers certified as qualified by an appropriate Judge Advocate General pursuant to Article 27*b* (2) is on file in the office of the Judge Advocate General of the armed force of which the officer concerned is a member. The qualifications of other officers as members of the bar of a Federal court or of the highest court of a State (Art. 27*c* (2)) will be determined by the convening authority before appointment on the basis of the officer's personnel records or by interrogation of the officer, or both. After such determination the officer concerned will report any change in his qualification to the convening authority. The record of trial will show verification of the qualifications recited on the orders. See 61*e* and *f* and appendix 8*a*.

d. ***Qualification of assistant trial counsel and assistant defense counsel.***—In general it is desirable that as many assistant defense counsel as assistant trial counsel be appointed, and that officers be appointed as assistant defense counsel and assistant trial counsel who have comparable military experience and legal qualifications. If the conduct of the prosecution or the defense in any case before a general court-martial devolves upon an assistant counsel, such assistant counsel must be qualified in the sense of Article 27*b* (Art. 38*d*, *e*). The conduct of the prosecution or defense does not devolve upon an assistant if the trial counsel or defense counsel, as the case may be, is present in court. When the trial counsel or assistant trial counsel conducting the prosecution before a special court-martial is qualified as a lawyer in the sense of Article 27*c*, the defense counsel or, in his absence, the assistant defense counsel upon whom the conduct of the defense has devolved, must be similarly qualified (Art. 38*e*).

See 61*f* (2) for procedure as to inquiry into the qualifications of individual counsel for the defense in cases where the accused does not desire the services of the regularly appointed personnel of the defense.

The appointing order for every general or special court-martial will expressly state whether assistant counsel are or are not legally qualified as lawyers in the sense of Article 27. See appendix 4 for form. Whenever appropriate, the qualifications of assistant counsel appointed for special courts-martial shall be determined and shown as prescribed in 6*c*.

7. APPOINTMENT OF REPORTERS AND INTERPRETERS.—Under such regulations as the Secretary of a Department may prescribe, the convening authority of a court-martial or military commission or a court of inquiry shall appoint qualified court reporters who shall record the proceedings of and testimony taken before such court or commission. Under like regulations the convening authority of a court-martial, military commission, or court of inquiry may appoint one or more interpreters who shall interpret for the court or commission (Art. 28).

The appointment and employment of reporters and interpreters may be effected by the convening authority personally or through a staff officer (including the trial counsel). The appointment of reporters may be oral and need not be shown in the record of trial or allied papers.

Unless otherwise directed by the convening authority, a reporter will not be appointed for summary courts-martial. The convening authority, when he deems it appropriate, may direct that a reporter not be used in special courts-martial. By regulations, the Secretary of a Department may require or restrict the appointment of reporters for summary and special courts-martial. See Article 19.

See 114 for oaths and 49 and 50 for duties. See appropriate departmental regulations for compensation and other matters pertinent to the employment of reporters and interpreters.

Chapter IV

JURISDICTION OF COURTS-MARTIAL

SOURCES, NATURE, AND REQUISITES—JURISDICTION AS TO PERSONS—JURISDICTION AS TO CONTEMPTS—TERMINATION OF JURISDICTION—EXCLUSIVE AND NONEXCLUSIVE JURISDICTION—RECIPROCAL JURISDICTION—JURISDICTION OF GENERAL COURTS-MARTIAL—JURISDICTION OF SPECIAL COURTS-MARTIAL—JURISDICTION OF SUMMARY COURTS-MARTIAL

8. SOURCES, NATURE, AND REQUISITES.—While courts-martial have no part of the jurisdiction set apart under the article of the Constitution which relates to the judicial power of the United States, they have an equally certain constitutional source. They are established under the constitutional power of Congress to make rules for the government and regulation of the armed forces of the United States, and they are recognized in the provisions of the fifth amendment expressly exempting "cases arising in the land and naval forces" from the requirement as to presentment and indictment by grand jury.

The jurisdiction of courts-martial is entirely penal or disciplinary. They have no power to adjudge the payment of damages or to collect private debts (126*h*).

"Courts-martial are lawful tribunals, with authority to determine finally any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced" (Grafton *v.* United States, 206 U. S. 333, 347–348; see also Hiatt *v.* Brown, 339 U. S. 103, 110).

The appellate review of records of trial provided by the code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed, as required by law, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation, as required by law, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in Article 73, and to action by the Secretary of a Department as provided in Article 74, and the authority of the President (Art. 76). Only a Federal court has jurisdiction on writ of habeas corpus to inquire whether a court-martial has jurisdiction of the person and the offense or whether it exceeded its powers in the sentence adjudged. See chapter XXIX.

The jurisdiction of courts-martial does not, in general, depend on where the offense was committed (Art. 5). See, however, Article 134 as to crimes and offenses not capital (213*c*). Similarly, the jurisdiction of a court-martial with respect to offenses against military law is not affected by the place where the court sits.

The jurisdiction of a court-martial—its power to try and determine a case—and hence the validity of each of its judgments, is conditioned upon these indispensable requisites: That the court was appointed by an official empowered to appoint it; that the membership of the court was in accordance with the law with respect to number and competency to sit on the court; and that the court was invested by act of Congress with power to try the person and the offense charged.

9. JURISDICTION AS TO PERSONS.—As to persons subject to the code under Article 2 and the act of 3 March 1909 (35 Stat. 748), as amended (24 U. S. C. 20), see Article 2 and notes thereunder in appendix 2. In addition to the persons described in Article 2, certain persons whose status as members of the armed forces or as persons otherwise subject to the code apparently has been terminated may, nevertheless, be amenable to trial by court-martial. See Articles 3, 4, and 73 and the notes thereunder.

It is not necessary that an accused be a person subject to the code under Article 2 in order to be amenable to trial by court-martial for a violation of Article 83, 104, or 106. For the jurisdiction of general courts-martial to try persons who by the law of war are triable by military tribunals, see 14.

10. JURISDICTION AS TO CONTEMPTS.—A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs the proceedings by any riot or disorder (Art. 48). See 118 (Contempts).

11. TERMINATION OF JURISDICTION.—*a. **General rule.***—The general rule is that court-martial jurisdiction over officers, cadets, midshipmen, warrant officers, enlisted persons, and other persons subject to the code ceases on discharge from the service or other termination of such status and that jurisdiction as to an offense committed during a period of service or status thus terminated is not revived by re-entry into the military service or return into such status.

*b. **Exceptions.***—To this general rule there are, however, some exceptions which include the following:

Jurisdiction as to an offense against the code for which a court-martial may adjudge confinement for five years or more committed by a person while in a status in which he was subject to the code and for which he cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia is not terminated by discharge or other termination of such status (Art. 3*a*). Jurisdiction under Article 3*a* should not be exercised without the consent of the Secretary of the Department concerned.

All persons in the custody of the armed forces serving a sentence imposed by a court-martial remain subject to military jurisdiction (Art. 2 (7)).

If a person in the military service obtains his discharge from an armed force by fraud, he may be apprehended and tried by court-martial for a violation of Article 83 (2). See 162. Upon conviction of said charge, such a person shall be subject to trial by court-martial for any offense under the code committed prior to the fraudulent discharge (Art. 3*b*).

Any person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of the code by virtue of a separation from any subsequent period of service regardless of the type of discharge under which such separation was accomplished (Art. 3*c*).

In those cases when the person's discharge or other separation does not interrupt his status as a person belonging to the general category of persons subject to the code, court-martial jurisdiction does not terminate. Thus when an officer holding a commission in a Reserve component of an armed force is discharged from that commission, while on active duty, by reason of his acceptance of a commission in a Regular component of that armed force, there being no interval between the periods of service under the respective commissions, there is no termination of the officer's military status—merely the accomplishment of a change in his status from that of a temporary to that of a permanent officer—and court-martial jurisdiction to try him for an offense committed prior to such discharge is not terminated by the discharge. Similarly, when an enlisted person is discharged for the convenience of the Government in order to re-enlist before the expiration of his prior period of service, military jurisdiction continues provided there is no hiatus between the two enlistments. A member of the armed forces who receives a discharge therefrom while serving without the continental limits of the United States and without the Territories enumerated in Article 2 (11), and who immediately becomes a person accompanying, serving, or employed by the armed forces in such an oversea area, remains amenable to trial by court-martial for offenses committed prior to his discharge because such discharge does not interrupt his status as a person subject to the code. So also a dishonorably discharged prisoner in the custody of an armed force may be tried for an offense committed while a member of the armed forces and prior to the execution of his dishonorable discharge.

c. ***Effect of voluntary absence from trial.***—The accused's voluntary and unauthorized absence after the trial has been commenced in his presence by arraignment does not terminate the jurisdiction of the court which may proceed with the trial to findings and sentence notwithstanding his absence. In such a case the accused, by his wrongful act, forfeits his right of confrontation.

d. ***Effect of termination of term of service.***—Jurisdiction having attached by commencement of action with a view to trial—as by apprehension, arrest, confinement, or filing of charges—continues for all purposes of trial, sentence, and punishment. If action is initiated with a view to trial because of an offense committed by an individual prior to his official discharge—even though the term of enlistment may have expired—he may be retained in the service for trial to be held after his period of service would otherwise have expired. See Article 2 (1).

12. EXCLUSIVE AND NONEXCLUSIVE JURISDICTION.—Courts-martial have exclusive jurisdiction of purely military offenses. But a person subject to the code is, as a rule, subject to the law applicable to persons generally, and if by an act or omission he violates the code and the local criminal law, the act or omission may be made the basis of a prosecution before a court-martial or before a proper civil tribunal, and in some cases before both. See 68*d* (Former jeopardy). The jurisdiction which first attaches in any case is, generally, entitled to proceed.

Under such regulations as the Secretary of a Department may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial (Art. 14*a*). See 97*c* and Article 14*b* as to the effect of such delivery to the civil authorities upon the execution of a sentence of a court-martial. See pertinent departmental regulations made pursuant to Article 14.

Under international law, jurisdiction over members of the armed forces of the United States or other sovereign who commit offenses in the territory of a friendly foreign state in which the visiting armed force is by consent quartered or in passage remains in the visiting sovereign. This is an incident of sovereignty which may be waived by the visiting sovereign and is not a right of the individual concerned.

The provisions of the code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect to offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals (Art. 21). See Articles 104 and 106 for some instances of concurrent jurisdiction.

13. RECIPROCAL JURISDICTION.—Each armed force shall have court-martial jurisdiction over all persons subject to the code. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President (Art. 17*a*).

In general, jurisdiction by one armed force over personnel of another should be exercised only when the accused cannot be delivered to the armed force of which he is a member without manifest injury to the service. Subject to this policy, the commander of a joint command or joint task force who has authority to convene general courts-martial may convene courts-martial for the trial of members of another armed force when specifically empowered by the President or the Secretary of Defense to refer such cases for trial by courts-martial. Such a commander may, in his sound discretion, specifically authorize commanding officers of subordinate joint commands or joint task forces who are authorized to convene special and summary courts-martial to convene such courts for the trial of members of other armed forces under such regulations as the superior commander may prescribe.

Cases involving two or more accused who are members of different armed forces should not be referred to a court-martial for a joint or a common trial.

As to the composition of a general or special court-martial for the trial of an accused who is a member of another armed force, see 4*g*.

In all cases, departmental review subsequent to that by the officer with authority to convene a general court-martial for the command which held the trial, where such review is required under the provisions of the code, shall be carried out by the armed force of which the accused is a member (Art. 17*b*).

14. JURISDICTION OF GENERAL COURTS-MARTIAL.—*a. **Persons and offenses.***—Subject to the regulations prescribed in 13, general courts-martial have power to try any person subject to the code for any offense made punishable by the code. In addition they have power to try any person who by the law of war is subject to trial by military tribunal for any crime or offense against the law of war and for any crime or offense against the law of territory occupied as an incident of war or belligerency whenever the local civil authority is superseded in whole or in part by the military authority of the occupying power. The law of occupied territory includes the local criminal law as adopted or modified by competent authority, and the proclamations, ordinances, regulations, or orders promulgated by competent authority of the occupying power (Art. 18).

b. ***Punishments.***—Upon a finding of guilty of an offense made punishable by the code, general courts-martial have the power, within certain limitations, to adjudge any punishment not forbidden by the code (Art. 18).

Certain punishments are mandatory under the law, for example, those prescribed by Articles 106 and 118 (1) and (4); the discretion of courts-martial to adjudge punishments may be limited by the President under Article 56 (125–127); the death penalty can be adjudged only when specifically authorized (Arts. 18, 52*b* (1)); and certain kinds of punishment are prohibited (Art. 55). When a general court-martial exercises jurisdiction under the law of war it may adjudge any punishment permitted by the law of war (Art. 18). Certain limitations on the discretion of military tribunals to adjudge punishments under the law of war are prescribed in international conventions, some of which are listed in the notes under Article 18 (app. 2).

15. JURISDICTION OF SPECIAL COURTS-MARTIAL.—*a.* ***Persons and offenses.***—(1) Subject to the regulations prescribed in 13, special courts-martial have power to try any person subject to the code for any noncapital offense made punishable by the code, and, under such regulations as are provided in this paragraph, for capital offenses (Art. 19). Although a capital offense for which there is prescribed a mandatory punishment beyond the punitive power of a special court-martial may never be referred to such a court, an officer exercising general court-martial jurisdiction over the command which includes the accused may cause any other capital offense to be referred to a special court-martial for trial. The Secretary of a Department may, by regulations, authorize officers exercising special court-martial jurisdiction to cause capital offenses, except those in violation of Articles 106 and 118 (1) and (4), to be tried by special court-martial without first obtaining the consent of the officer exercising general court-martial jurisdiction over the command.

(2) An offense is capital within the meaning of Article 19 when the maximum punishment which a general court-martial may adjudge therefor includes the death penalty. Subject to the exceptions noted in the following subparagraph, the offenses denounced in Articles 94, 99, 100, 102, 104, 110*a*, 118 (1) and (4), and 120*a* are capital at all

times; those denounced by Articles 85, 90, 101, 106, and 113 are capital if committed in time of war.

(3) Although capital under one of the articles cited, an offense is not capital if the applicable maximum limit of punishment prescribed by the President under Article 56 is less than death (127*c*); or, in any case in which the death penalty is not mandatory but is authorized by law whenever the authority competent to convene a court-martial for a capital case has directed that the case be treated as not capital pursuant to Article 49 (145*a*). Upon a rehearing or a new trial a case is not capital if the authorized sentence adjudged at a prior hearing or trial was other than death (Art. 63). However, no offense for which a mandatory punishment is prescribed can be tried by a special court-martial if such punishment is beyond the power of a special court-martial to adjudge. Thus a case of premeditated murder cannot be referred to a special court-martial for trial because the penalty in event of conviction must either be death or imprisonment for life (Art. 118 (1)).

b. ***Punishments.***—Special courts-martial may, under such limitations as the President may prescribe (125–127; Art. 56), adjudge any punishment not forbidden by the code except death, dishonorable discharge, dismissal, confinement in excess of six months, hard labor without confinement in excess of three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding six months. Subject to approval of the sentence by an officer exercising general court-martial jurisdiction (Art. 65*b*), and subject to appellate review as prescribed by Articles 66, 67, and, when applicable, Article 68, a special court-martial may adjudge a bad conduct discharge in the case of an enlisted person, but a bad conduct discharge shall not be adjudged by a special court-martial unless a complete record of the proceedings and testimony before the court has been made (Art. 19). As to forfeiture of pay, even when a bad conduct discharge is adjudged, a special court-martial is limited by Article 19 to the adjudgment of forfeiture of two-thirds pay per month for six months. As to other limitations see 125 to 127 (Punishments).

16. JURISDICTION OF SUMMARY COURTS-MARTIAL.—*a.* ***Persons and offenses.***—Subject to the regulations prescribed in 13, summary courts-martial have the power to try persons subject to the code except officers, warrant officers, cadets, aviation cadets, and midshipmen for any noncapital offense made punishable by the code. No person with respect to whom summary courts-martial have jurisdiction shall be brought to trial before a summary court-martial if he objects thereto unless under the provisions of Article 15 he has been permitted and has elected to refuse punishment under such article (132). If objection to trial by summary court-martial is made by an accused who has not been permitted to refuse punishment under Article 15, trial shall be ordered by a special or general court-martial, as may be appropriate (Art. 20).

The principles stated in 15*a* (2) and (3) apply to summary courts-martial.

b. ***Punishments.***—Summary courts-martial may, under such limitations as the President may prescribe (125–127; Art. 56), adjudge any punishment not forbidden by the code except death, dismissal, dishonorable or bad conduct discharge, confinement in excess of one month, hard labor without confinement in excess of 45 days, restriction to certain specified limits in excess of two months, or forfeiture of pay in excess of two-thirds of one month's pay (Art. 20) ; but in the case of noncommissioned or petty officers above the fourth enlisted pay grade, summary courts-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next inferior grade. See 126*c*(2).

The maximum amount of confinement and forfeiture of pay (or confinement and detention of pay) may be adjudged together in one sentence. Since confinement and restriction to limits are both forms of deprivation of liberty, only one of those punishments may be adjudged in maximum amount in any one sentence. An apportionment must be made if it is desired to adjudge both forms of punishment—confinement and restriction to limits—in one and the same sentence. For example, assuming the punishment to be in conformity with other limitations, a summary court-martial might adjudge confinement at hard labor for 15 days (one-half of the authorized confinement), restriction to limits for 30 days (one-half of the authorized restriction), and forfeiture of two-thirds pay for one month. In such a case the more severe form of deprivation of liberty is served first, the less severe thereafter.

In addition to or in lieu of other punishments, summary courts-martial have the power to adjudge reprimand or admonition.

Chapter V

APPREHENSION AND RESTRAINT

SCOPE—GENERAL—APPREHENSION—RESTRAINT—ARREST AND CONFINEMENT—DURATION AND TERMINATION—APPREHENSION OF DESERTERS BY CIVILIANS

17. SCOPE.—The paragraphs on this subject deal primarily with the apprehension and restraint of persons subject to the code in connection with trial by court-martial, and deal only incidentally or not at all with the apprehension and restraint of such persons for other purposes, with the apprehension and restraint of persons not subject to the code, and with various other matters touching apprehension and restraint such as those concerning confinement on bread and water or diminished rations (125), the effective date of certain sentences (126*h* (5)), execution of a sentence of confinement (93), resisting apprehension (174*a*), breaking arrest or escaping from custody or confinement (174*b*, *c*, *d*), releasing a prisoner without authority (175*a*), unlawful detention of another (176), and confinement as punishment for contempt (118).

18. GENERAL.—*a.* ***Definitions.***—*Apprehension* is the taking into custody of a person (Art. 7*a*; see 174*d*).

Arrest is the restraint of a person by an order not imposed as punishment for an offense directing him to remain within certain specified limits (Art. 9*a*).

Confinement is the physical restraint of a person (Art. 9*a*).

b. ***Basic considerations.***—(1) Any person subject to the code accused of an offense under the code shall be ordered into arrest or confinement as circumstances may require; but when accused only of an offense normally tried by a summary court-martial, such person ordinarily shall not be placed in confinement (Art. 10). The foregoing provision is not mandatory and its exercise rests within the discretion of the person vested with the power to arrest or confine. No restraint need be imposed in cases involving minor offenses. A failure to restrain does not affect the jurisdiction of the court.

(2) No member of the armed forces of the United States shall be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces of the United States (Art. 12). If members of the armed forces of the United States are separated from the other categories mentioned, however, they may be confined in the same jails, prisons, or other confinement facilities.

(3) Other than restraint administered as prescribed in this subparagraph (18*b* (3)), forfeiture of pay or allowances due on and after the date of approval of certain sentences, and minor punishments for infractions of discipline while confined, no punishment may be imposed upon an accused as a result of trial by court-martial until the sentence has been approved and ordered executed. No person, while being held awaiting trial or the result of trial, shall be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but, during such period, for infractions of discipline, he may be subjected to minor punishment (Art. 13). Minor punishment shall include all punishment authorized by appropriate departmental regulations for violations of the discipline prescribed for the place in which an accused is confined. Prisoners being held for trial or whose sentences have not been approved and ordered executed will be accorded the facilities, accommodations, treatment, and training prescribed in pertinent regulations. Although no forfeiture of pay or allowances may be effective prior to approval of the sentence by the convening authority, when a sentence of court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended, the forfeiture will apply to pay or allowances becoming due on and after the date the sentence is approved by the convening authority (126*h* (5); Art. 57*a*). But see 88*e* (2) (*c*) with respect to the suspension or deferment of forfeitures in certain cases.

19. APPREHENSION.—*a.* ***Who may apprehend.***—All officers, warrant officers, petty officers, noncommissioned officers, and, when in the execution of their guard or police duties, air police, military police, members of the shore patrol, and such persons as are designated by proper authority to perform guard or police duties, are authorized to apprehend, if necessary, persons subject to the code or subject to trial thereunder upon reasonable belief that an offense has been committed and that the person apprehended committed it. See Article 7*b*.

Petty officers, noncommissioned officers, and enlisted persons performing police duties should apprehend a commissioned or a warrant officer offender only pursuant to specific orders of a commissioned officer, except where such action is necessary to prevent disgrace to the service, the commission of a serious offense, or the escape of one who has committed a serious offense. In all cases involving the apprehension of officers and warrant officers by petty officers, noncommissioned officers, and enlisted persons performing police duties, the individual effecting the apprehension will, immediately after such apprehension, notify the officer to whom he is responsible or an officer of the air police, military police, or the shore patrol.

b. ***In quarrels, frays, or disorders.***—All officers, warrant officers, petty officers, and noncommissioned officers shall have authority to quell all quarrels, frays, and disorders among persons subject to the code and to apprehend persons subject to the code who take part in the same (Art. 7*c*).

c. ***Procedural steps to apprehend.***—An apprehension is effected by clearly notifying the person to be apprehended that he is thereby taken into custody. The order of apprehension may be either oral or written.

d. ***Securing custody of alleged offender.***—There is a clear distinction between the authority to apprehend and the authority to arrest or confine. Any person empowered to apprehend an offender is authorized to secure the custody of an alleged offender until proper authority may be notified, the limitations (21*a*; Art. 9) on the power to arrest or confine notwithstanding.

20. RESTRAINT.—*a.* ***Status of person in arrest.***—As used in this chapter, arrest is moral restraint imposed upon a person by oral or written orders of competent authority limiting the person's personal liberty pending disposition of charges. The restraint imposed is binding upon the person arrested, not by physical force, but by virtue of his moral and legal obligation to obey the order of arrest. He is subject to the restrictions incident to arrest prescribed in applicable regulations. A person in the status of arrest cannot be required to perform his full military duty, and if he is placed—by the authority who placed him in arrest or by superior authority—on duty inconsistent with such status his arrest is thereby terminated. This, however, does not prevent his being required to do ordinary cleaning or policing within the specified limits of his arrest, or to take part in routine training and duties not involving the exercise of command or the bearing of arms.

b. ***Restriction in lieu of arrest.***—An officer authorized to arrest (21*a*) may, within his discretion and without imposing arrest, restrict an accused person of his command, or subject to his authority, to specified areas of a military command with the further provision that he will participate in all military duties and activities of his organization while under such restriction. Thus an accused person may be required to remain within a specified area at specified times either because his continued presence pending investigation may be necessary or because it may be considered a wise precaution to restrict him to such an area in order that he may not again be exposed to the temptation of misconduct similar to that for which he is already under charges. Violations of such restrictions are punishable as violations of Article 134, as are breaches of punitive restrictions.

c. ***Confinement prior to trial.***—As used in this chapter, confinement is physical restraint, imposed by either oral or written orders of competent authority, depriving a person of freedom pending the disposition of charges. Confinement will not be imposed pending trial unless deemed necessary to insure the presence of the accused at the trial or because of the seriousness of the offense charged.

d. ***Procedure for arresting or confining.***—(1) *Preliminary inquiry into offense.*—No person shall be ordered into arrest or confinement except for probable cause (Art. 9*d*). No authority shall order a person into arrest or confinement unless he has personal knowledge of the offense or has made inquiry into it. Full inquiry is not required, but the known or reported facts should be sufficient to furnish reasonable grounds for believing that the offense has been committed by the person to be restrained.

(2) *Procedural steps to arrest.*—An arrest is imposed by notifying the person to be arrested that he is under arrest and informing him of the limits of his arrest. The order of arrest may be either oral or written.

(3) *Procedural steps to confine.*—A person to be confined is placed under guard and taken to the place of confinement. The authority ordering the confinement will cause to be delivered to the provost marshal, commander of the guard, prison officer, or master at arms, a written statement of the name, grade, and organization of the prisoner and of the offense of which he is accused. No provost marshal, commander of the guard, prison officer, or master at arms shall refuse to receive or keep any prisoner committed to his charge by an officer of the armed forces when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner (Art. 11*a*).

(4) *Notification to accused.*—When any person subject to the code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him (Art. 10). Concerning the time element between service of charges and trial, see Article 35. See Article 98 concerning unnecessary delay in the disposition of any case.

(5) *Report required.*—Every commander of a guard, prison officer, or master at arms to whose charge a prisoner has been committed shall, within 24 hours after such commitment, or, in the case of a commander of the guard or master at arms, as soon as he is relieved

from guard, report in writing to the commanding officer the name of such person, the offense charged against him, and the name of the person who ordered or authorized the commitment (Art. 11*b*).

e. ***Unlawful detention.***—Any person subject to the code who, except as provided by law, apprehends, arrests, or confines any person is subject to trial by court-martial (Art. 97).

21. **ARREST AND CONFINEMENT.**—*a.* ***Who may arrest or confine.***—Persons subject to the provisions of the code or to trial thereunder may be ordered into arrest or confinement as follows:

(1) *Officer, warrant officer, or civilian.*—Only a commanding officer to whose authority the individual is subject may order an officer, warrant officer, or civilian into arrest or confinement. The arrest or confinement must be effected by an order, oral or written, delivered in person or by another officer (Art. 9*c*). The authority to order such persons into arrest or confinement may not be delegated (Art. 9*c*). For this particular purpose, the term "commanding officer" shall be construed to refer to an officer commanding a post, camp, station, base, auxiliary airfield, Marine barracks, naval or Coast Guard vessel, shipyard, or other place where members of the armed forces are on duty, and the officer commanding or in charge of any other command who, under Article 24, has power to appoint a summary court-martial.

(2) *Enlisted person.*—Any officer may order an enlisted person into arrest or confinement. The arrest or confinement must be effected by an order, oral or written, delivered in person or through other persons subject to the code (Art. 9*b*). A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted persons of his command or subject to his authority into arrest or confinement (Art. 9*b*). Thus the commanding officer of any command or detachment may delegate to the warrant officers, petty officers, or noncommissioned officers thereof authority to place enlisted persons who are assigned or attached to his command or detachment, or who are temporarily within its jurisdiction, for example, in quarters, camp, base, station, or ship, in arrest or confinement as a means of restraint at the instant when restraint is necessary.

b. ***Authority of trial counsel to restrain.***—A trial counsel of a court-martial, as such, has no authority to place in arrest or confinement a person about to be tried by the court. These are duties which devolve upon the convening authority or upon the post, station, or base commander, or other proper officer in whose custody or command the accused is at the time.

c. ***Authority of courts-martial to restrain.***—A court-martial has no control over the nature of the arrest or other status of restraint of a prisoner except as regards his custody in its presence.

d. ***Responsibility for restraint after trial.***—Upon notification from a trial counsel of the result of a trial (44*e* (2)), a commanding officer will take prompt and appropriate action with respect to the restraint of the person tried. Such action, depending on the circumstances, may involve the immediate release of the person from any restraint, or the imposition of any necessary restraint pending final action on the case.

22. DURATION AND TERMINATION.—Although charges should be preferred promptly (25; Arts. 10, 30*b*, 33), the accused is not automatically released from restraint because of any delay in preferring the charges. He must remain in arrest or confinement until released by proper authority. The proper authority to release the accused from arrest is normally the officer who imposed the arrest. The proper authority to release from confinement in a military confinement facility is the commanding officer to whose command such facility is subject. Once a prisoner is placed in confinement he passes beyond the control and power of release of the officer who initially ordered him confined, unless such officer is the commanding officer described above. The release of a prisoner without proper authority is a punishable offense (Art. 96). Undue delay in preferring or prosecuting charges should be investigated with a view to prompt disposition of the case or, when appropriate, the release of the accused from arrest or confinement by competent authority. Any person subject to the code who is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under the code is subject to trial by court-martial (Art. 98).

23. APPREHENSION OF DESERTERS BY CIVILIANS.—*a.* ***Civil officers.***—Any civil officer having authority to apprehend offenders under the laws of the United States or of any State, District, Territory, or possession of the United States may apprehend summarily a deserter from the armed forces of the United States and deliver him into the custody of the armed forces of the United States (Art. 8).

The right of the United States to apprehend and bring to trial a deserter is paramount to any right of control over him by a parent on the ground of his minority.

b. ***Civilians generally.***—A private citizen has no authority, as such, without the order or direction of a military officer, to apprehend or restrain a deserter from the armed forces (Kurtz *v.* Moffit, 115 U. S. 487), but sending out a description of a deserter with a request for his apprehension and the offer of a reward for his apprehension or delivery, coupled with the provisions of law and regulations authorizing the payment of such reward, is sufficient authority for the apprehension of a deserter by a private citizen.

The fact that the person who apprehended and delivered a deserter was not authorized to do so is not a legal ground for the discharge of the deserter from military custody.

c. ***Delivery to and return of offenders from civil authorities.***— See Article 14 and appropriate departmental regulations.

Chapter VI

PREPARATION OF CHARGES

DEFINITIONS—WHEN PREFERRED—GENERAL RULES AND SUGGESTIONS—DRAFTING OF CHARGES—DRAFTING OF SPECIFICATIONS

24. DEFINITIONS.—*a. **Charges and specifications.***—The formal written accusation in court-martial practice consists of two parts, the technical charge and the specification. For offenses in violation of the code, the charge merely indicates the article the accused is alleged to have violated, while the specification sets forth the specific facts and circumstances relied upon as constituting the violation. Each specification, together with the charge under which it is placed, constitutes a separate accusation. The term "charges," or "charges and specifications," is applied to the formal written accusation or accusations against the accused. See Article 30.

*b. **Additional charges.***—New and separate charges preferred after others have been preferred are known in military law as "additional charges." They may relate to transactions not known at the time or to offenses committed after the original charges were preferred. Charges of this character do not require a separate trial, and, subject to the completion of the preliminary procedure necessary for all charges, may be tried with the original ones.

25. WHEN PREFERRED.—When any person subject to the code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused (32*f* (1)) and to try him or dismiss the charges and release him (Art. 10). Any person subject to the code who is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under the code shall be punished as a court-martial may direct (Art. 98). When it is intended to prefer charges, they should be preferred without unnecessary delay. An accumulation or saving up of charges through improper motives is prohibited; but when a good reason exists (as when a person is permitted to continue a course of conduct so that a ringleader or other conspirators may also be discovered, or when a suspected counterfeiter goes uncharged until his guilty knowledge becomes apparent), a reasonable delay is permissible if the person concerned is not in arrest or confinement.

Ordinarily, charges for an offense should not be preferred against an individual if, after investigation, the only available evidence that the offense was committed is his statement that he committed it. In rare cases, however, it may be advisable to prefer charges prior to the completion of an investigation made pursuant to such a statement, as, for example, when the statute of limitations may run before all contemplated witnesses can be interrogated.

26. GENERAL RULES AND SUGGESTIONS.—*a.* ***Elements of the offense.***—Before drafting charges and specifications the accuser should analyze the facts and study the pertinent paragraphs of chapter XXVIII, in which appear the elements of proof of various offenses, and appendix 6, in which the forms of specifications are set forth.

b. ***Offenses arising out of one transaction.***—One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person. A person should not be charged with both disorderly conduct and assault if the disorderly conduct consisted in making the assault, or with both a failure to report for a routine scheduled duty, such as reveille, and with absence without leave if the failure to report occurred during the period for which he is charged with absence without leave. The larceny of several articles should not be alleged in several specifications, one for each article, when the larceny of all of them can properly be alleged in one specification (200*a* (7)). If a person willfully disobeys an order to do a certain thing, and persists in his disobedience when the same order is given by the same or other superior, a multiplication of charges of disobedience should be avoided (169*b*). There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses. See 74*b* (4) and 76*a* (8).

c. ***Joining minor and serious offenses.***—Ordinarily, charges for minor derelictions should not be joined with charges for serious offenses. For example, a charge of failure to report for a routine roll call should not be joined with a charge of burglary. If, however, the minor offense serves to explain the circumstances of the greater offense, it is permissible to charge both.

d. ***Joint offenses.***—A joint offense is one committed by two or more persons acting together in pursuance of a common intent. See 156 for a discussion of principals and 157 for a discussion of accessories after the fact. Principals may be charged jointly with the commission of the same offense, but an accessory after the fact cannot be charged jointly with the principal he is alleged to have received, comforted, or assisted. Offenders are properly joined only if there is a common unlawful design or purpose; the mere fact that several persons happen to have committed the same types of offenses at the same time, although material as tending to show concert of purpose, does not necessarily establish it. The fact that several persons happen to have absented themselves without leave at about the same time will not, in the absence of evidence indicating a conspiracy, justify joining them in one specification, for they may merely have been availing themselves of the same opportunity of leaving.

In joint offenses the participants may be separately or jointly charged. However, if the participants are members of different armed forces, they should be charged separately. See 13. The preparation of joint charges is discussed in detail in appendix 6*a* (8). The advantage of a joint charge is that all the accused will be tried at one trial, thereby saving time, labor, and expense. This must be weighed against the possible unfairness to the accused which may result if their defenses are inconsistent or antagonistic. See 69*d* (Motion to sever). In drafting charges in such cases it must also be remembered that an accused cannot be called as a witness for the prosecution without his consent (148*e*). If, therefore, the testimony of an accomplice is necessary, he should not be tried jointly with those against whom he is expected to testify.

27. DRAFTING OF CHARGES.—The technical charge should be appropriate to all specifications under it, and ordinarily will be written: "Violation of the Uniform Code of Military Justice, Article —," giving the number of the article. Subparagraphs of the article under which the specification is laid need not be stated. Thus, in alleging murder while engaged in the perpetration of a robbery, "Article 118" is alleged in the charge, not "Article 118(4)." When an offense is specifically defined in a particular punitive article, it ordinarily should be charged under that article rather than under Article 134, the general article. Neither the designation of a wrong article nor the failure to designate any article is ordinarily material, provided the specification alleges an offense of which courts-martial have jurisdiction. For example, if an offense is alleged for which a mandatory punishment is prescribed by a particular article, such as premeditated murder (Art. 118), the mandatory punishment prescribed by the correct article must be adjudged—regardless of whether the offense has been laid under another article. See 74*c*. For other instructions see appendix 6*a*.

28. DRAFTING OF SPECIFICATIONS.—*a. **Contents of specification.***—The specification should include the following:

(1) The name of the accused and a showing, either by a description by rank and organization or otherwise, that he is within court-martial jurisdiction as to persons. For rules as to the manner of describing the accused, see the instructions in appendix 6*a*. The service number of the accused should not appear in the specification.

(2) A statement of where and when the offense was committed. Examples of the correct form for alleging place and time appear in appendix 6*a*.

(3) A statement in simple and concise language of the facts constituting the offense. The facts so stated will include all the elements of the offense sought to be charged. A specification must exclude every reasonable hypothesis of innocence. See 87*a* (2). Any intent, or state of mind such as guilty knowledge, expressly made an essential element of an offense should be alleged; thus the offense of delivering less than is called for by receipt in violation of Article 132 should be alleged as "knowingly" done. If the alleged act of the accused is not in itself an offense, but is made an offense by applicable statute (including Articles 133 and 134), regulations, or custom having the effect of law (213*a*), words importing criminality such as "wrongfully," "unlawfully," "without authority," or "dishonorably," depending upon the nature of the particular offense involved, should be used to describe the accused's acts. In this connection, see 28*c*. However, if the alleged act of the accused would not under any circumstances be an offense, the mere addition to the specification of words importing criminality will not in itself convert the act into an offense. To a reasonable extent matters of aggravation may be recited. If applicable, the wording of the appropriate punitive article or other statute should be used in preference to a supposedly equivalent expression. For example, in charging a person with being found drunk on duty, the specification should not allege that he was found intoxicated on duty.

b. ***Each specification to allege but one offense.***—One specification should not allege more than one offense either conjunctively or in the alternative. Thus a specification should not allege that the accused "lost and destroyed" or that he "lost or destroyed" certain property. However, if two acts or a series of acts constitute one offense, they may, of course, be alleged conjunctively.

c. ***Alleging written instruments; orders; directives.***—When a written instrument (e. g., counterfeit money, a forged document, a threatening letter, etc.), or a part thereof, forms the gist of an offense, the specification should set forth the writing, preferably verbatim, and the act or acts which constitute the offense. When the offense alleged constitutes a violation of an official directive of the Department of Defense or one of the Departments, or one of their agencies, bureaus, branches, forces, commands, or units, the specification should contain sufficient information to indicate what specific directive, or part thereof, the accused is alleged to have violated, and the act or acts which constitute the alleged violation. In this connection, see 147*a* and 171. However, omission, or an error in the citation, of the directive does not constitute fatal error if the omission or error does not mislead the accused to his prejudice. Oral statements should be set out as nearly as possible in exact words, but should always be qualified by the words "or words to that effect," or some similar expression.

d. ***Specimen forms.***—Specimen charges and forms for specifications covering the more usual offenses are in appendix 6. These prescribed forms should always be used when they are applicable or when they can be adapted to the offense which is to be alleged.

Chapter VII

SUBMISSION OF AND ACTION UPON CHARGES

INITIATING AND PREFERRING CHARGES—BASIC CONSIDERATIONS—ACTION BY PERSON HAVING KNOWLEDGE OF A SUSPECTED OFFENSE—ACTION BY COMMANDER EXERCISING IMMEDIATE JURISDICTION UNDER ARTICLE 15—ACTION BY OFFICER EXERCISING SUMMARY COURT-MARTIAL JURISDICTION—INVESTIGATION OF CHARGES—ACTION BY OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION

29. INITIATING AND PREFERRING CHARGES.—*a. **Who may initiate.***—Charges are initiated by someone bringing to the attention of the military authorities information concerning an offense suspected to have been committed by a person subject to the code. Such information may, of course, be received from anyone, whether subject to the code or not.

*b. **Who may prefer.***—Any person subject to the code may prefer charges, even though he be under charges, in arrest, or in confinement. In the great majority of cases, charges are actually preferred by the commander who exercises immediate jurisdiction over the accused under Article 15. However, when such a commander is also empowered to convene courts-martial and has only an official interest in the disposition of the case, it is customary for him to direct an officer of his command to make a preliminary inquiry into the suspected offense and to prefer appropriate charges if the facts shown by such inquiry should warrant the preferring of charges. See 5*a* (3) and (4), 33*a*, and Article 1 (11).

*c. **Ordering preferment.***—A person subject to the code cannot be ordered to prefer charges to which he is unable truthfully to make the required oath on his own responsibility.

*d. **Preparation of charge sheet.***—See chapter VI for instructions as to the preparation of charges and specifications. Available data as to service, witnesses, and similar items required to complete the first page of the charge sheet will be included. Ordinarily, the charge sheet will be forwarded in triplicate, and all copies will be signed. If several accused are charged on one charge sheet with the commission of a joint offense (26*d*; app. 6*a* (8)), the complete personal data as to each accused will be set forth on page 1 of the charge sheet or upon an attached copy of that page. One additional signed copy of the charge sheet will be prepared for each accused in excess of one.

*e. **Signing and swearing to charges.***—Charges and specifications shall be signed under oath before an *officer* of the armed forces authorized to administer oaths. For example, they may not be sworn to before a warrant officer who is not commissioned although, if such a warrant officer were an adjutant, he would have general authority to administer oaths for other purposes. See 113 and Articles 1 (5), 30, and 136. The form of oath is prescribed in 114 and is set forth on the charge sheet (app. 5).

In no case may an accused be tried on unsworn charges over his objection.

30. BASIC CONSIDERATIONS.—The following basic considerations apply to any action upon a charge or with respect to a suspected offense:

a. No person subject to the code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him—whether oral or written—may be used as evidence against him in a trial by court-martial. See Article 31*b*.

b. No charge shall be referred to a general court-martial for trial until the formal investigation required by Article 32 has been made (34).

c. No charge shall be referred to a general court-martial for trial until it has been referred for consideration and advice to the staff judge advocate or legal officer of the convening authority (35*b*; Art. 34*a*).

d. No charge shall be referred for trial if the convening authority is satisfied the accused is insane or was insane at the time of the offense charged (121).

e. When it appears to any accuser, or to any investigating officer or commander to whom sworn charges are forwarded in a particular case, that a witness then available may not be so available at a subsequent stage of the proceedings or that, because of distance or other reasons, the disposition of the case may be delayed pending the taking of depositions, he will promptly make the matter known to the officer competent to convene a court-martial for the trial of the offense charged so that depositions may be taken in accordance with the provisions of Article 49. See 5 and 117.

The preferring of charges and the taking of depositions in accordance with the provisions of Article 49 is of particular importance in preserving the testimony of witnesses in a case involving an offense committed by an accused who is absent without authority. Unless otherwise directed, the charges and allied papers in such a case will be held with the service record of the accused pending his return to military control.

f. Subject to jurisdictional limitations, charges against an accused, if tried at all, should be tried at a single trial by the lowest court that has power to adjudge an appropriate and adequate punishment. See 33*h* and *l*.

g. Immediately upon receipt of charges or of information as to a suspected offense, the proper authority shall determine the type of restraint, if any, that is to be imposed on the accused pending trial or other disposition of the case. See 18*b*, 20, 22, and Article 10.

h. Upon the receipt of charges or of information as to a suspected offense, the proper authority—ordinarily the immediate commanding officer of the accused—shall take prompt action to determine what disposition should be made thereof in the interests of justice and discipline. See Articles 30 and 98. When a person is held for trial by a general court-martial, the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction; otherwise, he shall report in writing to such officer the reasons for delay (Art. 33).

31. ACTION BY PERSON HAVING KNOWLEDGE OF A SUSPECTED OFFENSE.—When any person has knowledge of an offense committed by a person subject to the code, it is customary to report the facts to the commander exercising immediate jurisdiction over the accused under Article 15 to permit that commander to take the action outlined in 32. If charges are preferred by someone other than the commander who exercises immediate jurisdiction under Article 15, they should be forwarded to that commander to permit him to take the action outlined in 32. In preferring such charges, the accuser will be guided by the provisions of 29 and 30. Unless competent superior authority has directed otherwise, the accuser will forward the charges (ordinarily through the chain of command) to the commander who exercises immediate jurisdiction over the accused under Article 15, as follows:

a. ***Minor offenses.***—When it appears to the accuser that the case will be disposed of either under Article 15 or by reference to a summary court-martial, he need not forward the charges by letter of transmittal. However, in such a case, sufficient information about the circumstances, including an informal summary of the expected evidence, should be attached to the charges to enable the commander receiving them to make an intelligent disposition of them without conducting an additional investigation.

b. ***Serious offenses.***—When charges are submitted which may require trial by special or general court-martial, they will be forwarded by a letter of transmittal containing an explanation of any unusual features of the case. The letter of transmittal will also include or carry as an inclosure a summary of the evidence expected from each witness or other source. The signature of each witness to the summary of his testimony will be obtained unless the procurement of the signature will unduly delay the forwarding of the charges. All reasonably available documentary evidence (originals or admissible copies) will be forwarded with the charges unless, on account of the bulk of such evidence or for other good reason, it is inadvisable to do so. Any articles, weapons, or bulky items which may be useful as exhibits should be properly marked for later identification, preserved, and referred to in the charge sheet or letter of transmittal with a statement as to where they may be found.

c. ***Exceptional cases.***—In exceptional cases in which the accused is not, strictly speaking, under the command of any military authority inferior to a particular Department, the general principles of this paragraph (31) are applicable; but the charges may, according to the particular circumstances, be forwarded either to the appropriate Department or to the commander of the area command in which the accused may be. In this conection, see the first exception in 11.

32. ACTION BY COMMANDER EXERCISING IMMEDIATE JURISDICTION UNDER ARTICLE 15.—Upon the receipt of charges or information indicating that a member of his command has committed an offense punishable by the code, the commander exercising immediate jurisdiction over the accused under Article 15 ordinarily will—subject to the *basic considerations* stated in 30—dispose of the case in the following manner:

a. ***Exception.***—See 33*a* for the action to be taken when the commander exercising immediate jurisdiction over the accused under Article 15 is also empowered to convene courts-martial.

b. ***Preliminary inquiry.***—He will make, or cause to be made, a preliminary inquiry into the charges or the suspected offenses sufficient to enable him to make an intelligent disposition of them. This inquiry is usually informal. It may be conducted by the commander or by a member of his command. It may consist only of an examination of the charges and the summary of expected evidence which accompanies them; in other cases it may involve the interview of witnesses, the search of barracks, quarters, or other places, or the collection of documentary evidence. With respect to searches, see 152. See 32*f* for the information which must accompany charges if they are forwarded with a recommendation for trial. It is not the function of the person making the inquiry merely to prepare a case against the accused. He should collect and examine all evidence that is essential to a determination of the guilt or innocence of the accused, as well as evidence in mitigation or extenuation.

c. ***Preferring charges.***—When charges have not already been preferred and the preliminary inquiry shows that offenses punishable by the code have been committed by a member of his command, he may prefer appropriate charges for those offenses which he believes cannot properly be disposed of under Article 15. See 29 for instructions as to the manner of preferring charges. If charges have already been preferred, but they are not formally correct or do not conform to the expected evidence, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence may be made (33*d*; Art. 34*b*). When the preliminary inquiry shows that additional or different offenses have been committed (24*b*), the immediate commander may prefer appropriate new charges for those offenses which he believes cannot properly be disposed of under Article 15. In such a case, he should consolidate all charges against the accused into one set of charges.

d. ***Dismissal of charges.***—He may decide, as a result of the preliminary inquiry, that all or some of the charges do not warrant further action because they are trivial, do not state offenses, are unsupported by available evidence, or because there are other sound reasons for not punishing the accused with respect to the acts alleged. Likewise, as to suspected offenses for which charges have not been preferred, he may determine that charges should not be preferred. If so, he need not prefer charges. Unless competent superior authority has directed otherwise, he may dismiss all or part of any charges that have been preferred. With respect to offenses for which charges have been preferred, specifications and charges thus disposed of will be lined out and initialed. If all offenses charged are dismissed, he may notify the accuser of the action taken and the reasons therefor.

e. ***Non-judicial punishment.***—Unless competent superior authority has directed otherwise, he may impose punishment under Article 15 for any minor offense (whether charged or not). See 128 and 131. With respect to offenses for which charges have been preferred, specifications and charges thus disposed of under Article 15 will be lined out and initialed and any remaining charges and specifications renumbered. If he believes punishment under Article 15 is proper in the case of a commissioned officer or warrant officer, he ordinarily should forward the charges and allied papers or the report of preliminary inquiry to the officer exercising immediate summary court-martial jurisdiction with an appropriate recommendation. When reduction to the next inferior grade is considered a proper punishment in a case of a noncommissioned or petty officer, and he is not authorized to impose such punishment, he should forward the charges or report, with his recommendation, to a commander who has such authority under Article 15. In this connection, see 129 and 131*b* (2).

f. ***Forwarding charges.***—If trial by court-martial is believed to be appropriate for any remaining offenses, the charges will be forwarded (ordinarily through the chain of command) to the officer exercising summary court-martial jurisdiction over the command of which the accused is a member. In forwarding such charges, the following rules will be observed:

(1) *Informing accused of charges.*—Prior to forwarding the charges, the immediate commander will inform the accused of the charges against him (Arts. 10, 30*b*) and complete and sign the certificate to that effect on page 3 of the charge sheet. See appendix 5. When, because of the unavailability of the accused, it is impracticable to comply with this requirement, a report of the circumstances will be included in the letter forwarding the charges.

(2) *Notice of refusal to accept punishment under Article 15.*—The immediate commander will note in the space provided on page 4 of the charge sheet whether the accused has been permitted and has elected to refuse punishment under Article 15 as to any offense charged. See 16*a*, 132, appendix 5, and Article 20.

(3) *Minor offenses.*—When charges are submitted with a view to trial by summary court-martial or action under Article 15, they need not be forwarded by a formal letter of transmittal, but should be accompanied by evidence of admissible previous convictions and sufficient information about the circumstances, including an informal summary of the expected evidence, to enable the commander receiving them to make an intelligent disposition of the case without an additional investigation. The forwarding of charges by the commander exercising immediate jurisdiction over the accused under Article 15, unaccompanied by a formal letter of transmittal, will be considered a recommendation for trial by summary court-martial.

(4) *Serious offenses.*—When charges are submitted with a view to trial by special or general court-martial, they will be forwarded by a letter of transmittal signed personally by the forwarding officer. The letter will include, or carry as inclosures, the following:

(*a*) A summary of the evidence expected from each witness or other source. The signature of each witness to the summary of his testimony will be obtained unless the procurement of the signature will unduly delay the forwarding of the charges.

(*b*) All reasonably available documentary evidence and exhibits. If, because of the bulk of such evidence or for other good reason, it is inadvisable to forward it with the letter of transmittal, it should be properly marked, preserved, and referred to in the charges or the letter of transmittal, with a statement as to where it may be found.

(*c*) Evidence of admissible previous convictions by courts-martial (75*b* (2)) which, in the case of enlisted persons, is usually in the form of an attested copy of the pertinent entries in the accused's service record. See 143*b* (2) and 144*b* (Official records).

(*d*) Explanation of any unusual features of the case, including such matters as the character of the accused's military service prior to the offense charged and his record prior to entry into the military service, if known.

(*e*) Specific recommendation as to the disposition of the charges.

33. ACTION BY OFFICER EXERCISING SUMMARY COURT-MARTIAL JURISDICTION.—Upon the receipt of charges or information indicating that a member of his command has committed an offense punishable by the code, the officer exercising summary court-martial jurisdiction over the accused will—subject to the *basic considerations* stated in 30—ordinarily dispose of the case in the following manner:

a. ***Preliminary inquiry.***—When charges have not already been preferred, and the officer exercising summary court-martial jurisdiction is also the commander exercising immediate jurisdiction over the accused under Article 15, he may take the action outlined in 32. However, if the officer exercising summary court-martial jurisdiction becomes an accuser in fact, he renders himself ineligible to exercise whatever powers he may have had to convene a special or general court-martial for the trial of the case. See Articles 22*b* and 23*b*. Accordingly, when he has only an official interest in the case (5*a* (4)), he ordinarily will transmit the available information about the case to an officer of his command "for preliminary inquiry and report, including, if appropriate in the interest of justice and discipline, the preferring of such charges as appear to you to be sustained by the expected evidence."

Unless otherwise directed, the officer to whom such a case is transmitted will make a preliminary inquiry similar to that described in

32*b*. If the officer making the inquiry forwards his report without preferring charges, the officer exercising summary court-martial jurisdiction will take the action outlined in 32; if the officer making the inquiry prefers charges, the officer exercising summary court-martial jurisdiction will dispose of them in accordance with the rules prescribed in the remaining subparagraphs of this paragraph (33).

b. ***Date of receipt.***—Immediately upon the receipt of sworn charges against a member of his command, the officer exercising summary court-martial jurisdiction will cause the hour and date of receipt to be entered in the space provided on page 3 of the charge sheet (app. 5). This date is important as it fixes the end of the period of time which is to be considered in determining whether the prosecution of the accused is barred by the statute of limitations. See Article 43*b* and *c*.

c. ***Informing accused of charges.***—If, when charges are received by the officer exercising summary court-martial jurisdiction, it appears that the accused has not been advised of the charges against him, the action prescribed in 32*f* (1) will be taken promptly.

d. ***Alterations.***—The officer exercising summary court-martial jurisdiction will make a preliminary examination of the charges and the allied papers to determine whether the specifications are laid under the proper punitive articles and are supported by the expected evidence. Charges forwarded or referred for trial and the accompanying papers should be free from defect of form and substance, but delays incident to the return of papers to the accuser for correction of defects which are not substantial will be avoided. Obvious errors may be corrected and the charges may be redrafted over the accuser's signature, provided the redraft does not include any person, offense, or matter not fairly included in the charges as preferred. Corrections and redrafts should be initialed by the officer making them. If a change involves the inclusion of any person, offense, or matter not fairly included in the charges as preferred, new charges, consolidating all offenses which are to be charged, should be signed and sworn to by an accuser. See Article 34*b*.

e. ***Investigations.***—When the offenses are so serious that it may be appropriate to forward them with a recommendation for trial by general court-martial, he will appoint an officer to investigate the charges in accordance with 34 and Article 32, subject to the following exceptions:

(1) *Effect of investigation of subject matter before charges preferred.*—If an investigation of the subject matter of an offense was conducted prior to the time the accused was charged with the offense (e. g., court of inquiry), and if the accused was present at the investi-

gation of that charge and was afforded the rights set forth in Article 32*b*, no further investigation of that charge is necessary unless it is demanded by the accused after he is informed of the charge. A demand for further investigation in such a case entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf. See Article 32*c*.

(2) *Effect of changing charges after investigation is made.*—If the charges were investigated pursuant to 34 and Article 32*b* before reaching the officer exercising summary court-martial jurisdiction, he need not direct another investigation unless there is reason to believe that a further investigation would aid in the administration of military justice. In any event, supplementary investigations by the same or a different investigating officer may be directed. If, at any time after an investigation under Article 32*b* has been conducted, the charges are changed to allege a more serious or essentially different offense, a new investigation should be directed to give the accused an opportunity to exercise the privileges afforded him by 34 and Article 32*b* with respect to the new or different matters alleged. In this connection, see 33*d*.

f. ***Dismissal of charges.***—He has the same authority as the commander exercising immediate jurisdiction over the accused under Article 15 with respect to dismissal of all or part of the charges. In this connection, see 32*d*.

If the officer exercising summary court-martial jurisdiction finds that trial of a particular case would be warranted except for the fact that it would probably be detrimental to the prosecution of a war or inimical to the national security, he will, without dismissing any charges that may have been preferred, forward the case to the officer exercising general court-martial jurisdiction over the command who, if he concurs in such finding, will forward the case through the chain of command to the Secretary of the appropriate Department. In this connection, see Article 43*e*. Any officer exercising general court-martial jurisdiction who receives the charges in such a case is authorized to determine whether trial of the accused is warranted under the circumstances and, if so, whether the security considerations involved are paramount to trial. In an appropriate case, such a commander may, instead of forwarding the charges, dismiss them or authorize their trial.

g. ***Non-judicial punishment.***—He has the same authority as the commander exercising immediate jurisdiction over the accused under Article 15 with respect to the imposition of non-judicial punishment. See 32*e*, 129, and 131. He may impose such punishment himself or he may direct the immediate commander of the accused to take appropriate action. In the case of warrant officers and officers, he will usually impose such punishment or, if he believes a forfeiture of pay to be appropriate in the interest of justice and discipline, he will forward the charges and allied papers or the report of preliminary inquiry (if charges have not been preferred) to the officer exercising general court-martial jurisdiction with a specific recommendation over his own signature as to the exact punishment he believes should be imposed.

h. ***Disposition of the charges by trial.***—If he determines that some punishment should be adjudged against the accused, but that punishment under Article 15 is not appropriate or has in a proper case been refused by the accused, he must decide to which kind of court-martial the case should be referred. Subject to jurisdictional limitations, charges against an accused, if tried at all, should be tried at a single trial by the lowest court that has the power to adjudge an appropriate and adequate punishment. See 33*l*. The fact that, upon conviction of a particular offense, the Table of Maximum Punishments (127*c*) may authorize a punishment in excess of that which can be adjudged by a summary or special court-martial does not in itself preclude reference of such an offense to a summary or special court-martial for trial. In this connection, see 15*a* and 16*a* as to the authority to cause a capital case to be tried by an inferior court-martial. He should take into consideration the character and prior service of the accused, as well as the established policies of superior authority, in deciding upon his action or recommendation. For example, he should not hesitate in a proper case involving offenses of a purely military nature, to dismiss the charges (32*d*) or refer them to an inferior court-martial for trial. When any offense charged is not of a purely military nature, he should take into account the fact that the retention in the armed forces of thieves and persons guilty of moral turpitude injuriously reflects upon the good name of the military service and its self-respecting personnel. If he determines that the offense is so serious that the accused, if convicted, should be separated from the service by a punitive discharge, he must decide to which court the case should be referred in order that the appropriate kind of discharge—dishonorable or bad conduct—may be adjudged. In this connection, see 76*a* (6) and (7). Ordinarily, a specification as to which the statute of limitations (Art. 43) apparently may be successfully pleaded should not be referred for trial. See 68*c*.

i. ***Forwarding charges.***—When trial by a special or general court-martial is deemed appropriate, and he is not empowered to convene such a court for the trial of the case (5*a*, *b*), he will forward the charges and necessary allied papers (ordinarily through the chain of command) to the officer exercising the appropriate kind of court-martial jurisdiction. The charges will be forwarded by indorsement or letter of transmittal, signed by the forwarding officer, and containing his recommendation as to their disposition. If the charges are forwarded with a recommendation for trial by general court-martial, the forwarding officer should observe the following rules:

(1) He will inclose a copy of the report of investigation made under 34 and Article 32 or will explain why such an investigation was not made prior to forwarding the charges.

(2) If an investigation under 34 and Article 32 was made, he will cause a copy of the substance of the testimony taken on both sides during the investigation to be furnished to the accused and will report that fact in his indorsement or letter of transmittal.

(3) He will note in the indorsement or letter of transmittal whether any material witnesses may not be available at the time of the trial and the action that has been initiated to have such witnesses or their depositions available at the trial. See chapter XXIII and Article 49.

j. ***Reference for trial.***—(1) *Manner of reference.*—Charges are ordinarily referred to a court-martial for trial by means of the indorsement on page 3 of the charge sheet (app. 5). Although the indorsement is usually completed on all copies of the charge sheet, only the original need be signed. The indorsement may include any proper instructions; for instance, a direction that the charges be tried with certain other charges against the accused (24*b*), or in a common trial with other persons (33*l*), or that a capital case be treated as not capital (15*a* (3); Art. 49*f*). If for any proper reason it is desired to refer charges to a court different than that to which they were originally referred, the new reference is customarily accomplished by means of a new indorsement affixed to the charge sheet. In such a case, the original indorsement is lined out and initialed.

(2) *Special court-martial.*—The officer exercising summary court-martial jurisdiction (5*c*; Art. 24) is *often also empowered to convene special courts-martial* (5*b*; Art. 23). If he is so empowered and determines that trial by special court-martial is appropriate, he should complete the indorsement in the prescribed manner and transmit the charges and allied papers (ordinarily in duplicate, but with one additional copy of the charges for each accused in excess of one) to the trial counsel of the court.

(3) *Summary court-martial.*—If he determines that trial by summary court-martial is appropriate, he should complete the indorse-

ment in the prescribed manner and transmit the charges (ordinarily in triplicate) to the summary court-martial. If the only officer present with a command decides to try the charges as summary court-martial, no indorsement is required.

k. ***Reporters in trials by special courts-martial.***—When the convening authority is authorized to direct that a reporter not be appointed for trials by special courts-martial, he may, in an appropriate case, include in the indorsement referring the charges for trial the direction, "Reporter not authorized." In this connection, see 7.

l. ***Common trial.***—If two or more persons are charged with the commission of an offense or offenses which, although not jointly committed (26*d*), were committed at the same time and place and are provable by the same evidence, the convening authority may in his discretion direct a common trial for such offenses only. Offenses charged against different accused which are not closely related should not be tried in a common trial, notwithstanding the fact that some other offenses with which each accused is charged may be closely related. See 69*d* (Motion to sever). For example, when A and B are each charged with larcenies alleged to have been committed at the same time and place, and B is also charged with an aggravated assault alleged to have been committed several days later, the assault specification against B should not be tried in a common trial, although the charges of larceny may properly be tried at such a trial. The convening authority may exercise his discretion in determining the order in which such charges shall be tried.

m. ***Suspected insanity.***—If he suspects that an accused lacks mental capacity or that he was not mentally responsible at the time of the offense charged, he should initiate an inquiry into the mental condition of the accused as provided in 121.

34. INVESTIGATION OF CHARGES.—*a.* ***Introductory statement.***—No charge shall be referred to a general court-martial for trial until a thorough and impartial investigation thereof has been made (Art. 32).

The officer appointed to make such an investigation should be a mature officer, preferably an officer of the grade of major or lieutenant commander or higher, or one with legal training and experience. Neither the accuser nor any officer who is expected to become the law officer or a member of the prosecution or defense upon possible trial of the case will be designated as investigating officer.

In conducting the investigation, the investigating officer will comply with Articles 31 and 32. The purpose of the investigation required by Article 32 is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information upon which to determine what disposition should be made of the case. It is not the function of the investigating officer to perfect a case against the accused, but to ascertain and impartially weigh *all* available facts in arriving at his conclusions. He is required to conduct *a thorough and impartial investigation* and is not limited to the examination of witnesses and documentary evidence listed on the charge sheet or mentioned in the papers accompanying the charges. He should extend his investigation as far as may be necessary to make it thorough. The investigation should be dignified and military, as brief as is consistent with thoroughness and fairness, and limited to the issues raised by the charges and to the proper disposition of the case. Any failure to comply substantially with the requirements of Article 32 which results in prejudice to the substantial rights of the accused at the trial—such as a denial of a reasonable opportunity to secure material witnesses for use at the trial or of an opportunity to prepare his defense—may require a delay in disposition of the case or disapproval of the proceedings. See 69*c* and 87*c*. Similarly a failure to comply with the provisions of Article 31 may result in a miscarriage of justice. Recommendations of an investigating officer are advisory only.

The remainder of this paragraph (34) is intended primarily to indicate a proper procedure in the usual cases. Variations to meet the circumstances of other cases or exceptional or local conditions, or for any other good reasons, are not only permissible but should be adopted, provided the spirit and purpose of the statutory requirements referred to above are observed and carried out.

b. ***Advising the accused.***—At the outset of the investigation the accused will be informed of the following: The offense charged against him; the name of the accuser and of the witnesses against him as far as then known by the investigating officer; the fact that charges are about to be investigated; his right to have counsel represent him at the investigation if he so desires, as provided in Article 32; his right to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense, extenuation, or mitigation; his right to have the investigating officer examine available witnesses requested by him; his right to make a statement in any form, but that he is not required to make any statement regarding the offense of which he is accused or being investigated, and that any statement he may make may be used as evidence against him in a trial by court-martial.

c. ***Counsel.***—If the accused requests that he be represented by counsel, the investigating officer will promptly report the request to the officer who referred the charges for investigation. The latter will take the following action:

(1) If the accused requests civilian counsel of his own selection, he will give the accused a reasonable opportunity to obtain the civilian counsel without unduly delaying the investigation, but such counsel will not be provided at government expense.

(2) If the accused desires military counsel of his own selection, and if the requested military counsel is reasonably available within the command, he will provide such military counsel. If the counsel is not under the command of the officer who referred the charges for investigation, that officer will take prompt action to ascertain the availability of the requested counsel and, if available, to obtain his services without unduly delaying the investigation.

(3) If counsel is not provided as indicated in (1) or (2) above, and if the officer who ordered the investigation is the officer exercising general court-martial jurisdiction over the command, he will detail a competent officer to represent the accused as counsel at the investigation; otherwise he will forward the request of the accused directly and expeditiously to the officer exercising general court-martial jurisdiction over the command, who will promptly designate and provide such counsel. It may be appropriate for the officer exercising general court-martial jurisdiction to designate a permanent pretrial counsel to act in all cases arising within a particular area or at a particular station, thus avoiding delay in investigations. For example, the regularly appointed defense counsel and assistant defense counsel of the general court-martial appointed to sit at a particular station may be designated as pretrial counsel.

If practicable, charges must be forwarded to the officer exercising general court-martial jurisdiction within eight days after an accused is ordered into arrest or confinement (Art. 33). The investigation should be conducted promptly, while the events are fresh in the minds of witnesses. An investigation will not be delayed if the accused is unable to provide civilian counsel of his own selection within a reasonable time after having been given an opportunity to obtain such counsel.

The principles stated in 42*b* and 48 apply equally to the counsel at the investigation. Whenever counsel is requested by the accused, the investigation will be conducted in the presence of the counsel unless the accused expressly excuses him.

d. ***Witnesses.***—All available witnesses, including those requested by the accused, who appear to be reasonably necessary for a thorough and impartial investigation will be called and examined in the presence of the accused, and if counsel has been requested, in the presence of the accused and his counsel. Ordinarily, application for the attendance of any witness subject to military law will be made to the immediate commanding officer of the witness. The decision of the officer exercising summary court-martial jurisdiction over the command to which the witness belongs is final as to availability. There is no provision for paying compensation to any witness who gives evidence at the pretrial investigation. There is no provision for compelling the attendance of witnesses not subject to military jurisdiction.

Witnesses who give evidence during the investigation should be examined on oath or affirmation and, unless procurement of their signatures will cause undue delay in the completion of the investigation, they should sign and swear to the truth of the substance of their statements after they have been reduced to writing. If the accused elects to make a statement, he shall have the option of making it under oath or affirmation or of making an unsworn statement; he should be afforded the opportunity of signing and swearing to the truth of the substance of his statement after it has been reduced to writing. See 114 for forms of oaths. If material witnesses on behalf of the accused or the prosecution are not reasonably available, and if it appears that they may not be available at the time of trial, the investigating officer should initiate action with a view toward obtaining necessary depositions. See 30*e*, 117, and Article 49.

When the investigating officer makes known to the accused the substance of the testimony expected from a witness as ascertained from a written statement of the witness, interview with the witness, or other similar means, and the accused states that he does not desire to cross-examine the witness, the witness need not be called even if available. When a witness requested by the accused is available, the witness need not be called if the accused withdraws his request upon being informed that the testimony expected by the accused from the witness will be regarded as having been actually taken.

To the extent required by fairness to the Government and the accused, documentary evidence and statements of witnesses who are not available will be shown, or the substance thereof will be made known, to the accused and, if counsel has been requested, to his counsel.

e. ***Formal report.***—Whenever it appears that the case may be disposed of by reference to a general court-martial for trial, a formal report of investigation will be made to the officer who directed it. In this connection, see 34*f*. Such a report ordinarily will be made in triplicate, but one additional copy will be made for each accused in excess of one. For a form of report, see appendix 7. Although previously prepared forms may be used, special care should be exercised to insure that the use of forms of report of investigation does not result in perfunctory or inaccurate certifications of compliance with the requirements of this paragraph (34). Unless otherwise indicated by him, the submission of his report by an investigating officer will be regarded as a statement that to the best of his knowledge and belief the investigation of the matters set forth in the charges was made in substantial conformance with all requirements, the matters set forth in the charges as to which he recommends trial are true, and such charges are in proper form.

A formal report by indorsement or letter will include or carry as inclosures or by reference to other papers returned or submitted by him with the report:

(1) A statement of the name, organization, or address of counsel and information as to the presence or absence of counsel throughout the proceedings in all cases in which counsel has been requested by the accused.

(2) A statement of the substance of the testimony taken on both sides, including any stipulated testimony (e. g., when an accused withdraws a request for a witness upon being told that the testimony expected would be regarded as taken). One additional copy of the statement of the substance of the testimony taken will be prepared for each accused to enable the officer exercising summary court-martial jurisdiction to furnish each accused with a copy if the charges are forwarded to the officer exercising general court-martial jurisdiction. See 33*i* (2) and Article 32*b*.

(3) Any other statements, documents, or matters considered by him in reaching his conclusions or making his recommendations, or recitals of the substance or nature of such items.

(4) A statement of any reasonable ground for the belief that the accused is, or was at the time of an offense, mentally defective, deranged, or abnormal.

(5) A statement as to whether essential witnesses will be available in the event of trial. If essential witnesses will not be available, the reasons for nonavailability will be stated.

(6) The recommendation of the investigating officer as to what disposition should be made of the case.

*f. **Informal report.***—Unless competent superior authority has directed otherwise, if it does not appear that the case will be disposed of by reference for trial by general court-martial, an informal report to the officer who directed the investigation will be made orally or by a brief memorandum, indorsement, notations on the charge sheet, or other suitable means. However made, the report need include in abbreviated form only the first, second, fourth, and sixth items of the formal report, but the sources of any material evidence for either side which were not shown in the papers received by the investigating officer should be reported.

35. ACTION BY OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION.—*a. **General.***—The charges received by the officer exercising general court-martial jurisdiction ordinarily will have been investigated under the provisions of 34 and Article 32, and will have been examined and forwarded with an appropriate recommendation by an officer exercising summary court-martial jurisdiction. The charges and allied papers usually will be in triplicate, with one additional copy for each accused in excess of one. With respect to the disposition of charges received by him, he is empowered, as the officer exercising general court-martial jurisdiction, to refer them for trial to a general court-martial convened by him, to authorize the trial of certain capital offenses by inferior courts-martial, or, in lieu of trial, to impose forfeitures of pay in appropriate cases upon officers and warrant officers of his command under the provisions of Article 15. In addition to these powers—none of which may be delegated—he may take any action on the charges which the immediate commander (32) or the officer exercising summary court-martial jurisdiction (33) is authorized to take. He may take this latter action himself or he may return the charges and allied papers to a proper subordinate commander with the instruction that appropriate action be taken by him.

*b. **Reference to staff judge advocate or legal officer.***—Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate or legal officer for consideration and advice. The convening authority shall not refer a charge to a general court-martial for trial unless he has found that the charge alleges an offense under the code and is warranted by evidence indicated in the report of investigation (Art. 34*a*).

Subject to the provisions of this paragraph (35), reference to a staff judge advocate or legal officer will be made and his advice submitted in such manner and form as the convening authority may direct, but the convening authority shall at all times communicate directly and personally with his staff judge advocate or legal officer in matters relating to the administration of military justice. See Article 6*b*. No person who has acted as investigating officer, law officer, or member of the court, prosecution, or defense in any case shall subsequently act as staff judge advocate or legal officer in the same case. See Article 6*c*.

c. ***Action of the staff judge advocate or legal officer.***—The advice of the staff judge advocate or legal officer shall include a written and signed statement as to his findings with respect to whether there has been substantial compliance with the provisions of Article 32, whether each specification alleges an offense under the code, and whether the allegation of each offense is warranted by the evidence indicated in the report of investigation; it shall also include a signed recommendation of the action to be taken by the convening authority. Such recommendation will accompany the charges if they are referred for trial. See 44*g* (1) and *h*.

Chapter VIII

APPOINTMENT OF COURTS-MARTIAL

APPOINTING ORDERS—CHANGES IN PERSONNEL—INSTRUCTING PERSONNEL OF COURT

36. APPOINTING ORDERS.—*a.* ***General.***—See 4 to 6, inclusive, for various matters relating to the appointment of courts-martial, including the appointment of a law officer, and the appointment of trial counsel, defense counsel, and their assistants. Appointment of personnel to court-martial duty is prima facie evidence that they are on active duty with an armed force. See Article 25.

b. ***Form and content.***—A court-martial is created by an appointing order issued by the convening authority. The appointing order designates the kind of court, the place and time it is to meet, lists the members of the court, and, when appropriate, the law officer and the members of the prosecution and defense. The qualifications of the law officer under Article 26 and of the members of the prosecution and defense under Article 27 are shown in the appointing order. If enlisted personnel are appointed as members of the court, the unit (company, squadron, ship's crew, or corresponding body (4*a;* Art. 25*c*)) of which each is a member is shown. The appointing order may contain a provision for the withdrawal of unarraigned cases from other courts-martial and referral of those cases to the new court; it should contain no reference as to whether a reporter or interpreter is authorized. See appendix 4 for forms of appointing orders.

c. ***Selection of personnel.***—(1) *General.*—Courts-martial are ordinarily composed of personnel of the convening authority's command. With respect to utilizing personnel of other commands or other armed forces, see 4*g*. If his subordinate commands are separated geographically, the convening authority may appoint a court for each locality, using personnel from the area where the court is to sit. When a general court-martial is to be, or has been, appointed to sit at a post, camp, station, or subordinate command at a distance from the officer exercising general court-martial jurisdiction, and the personnel of the court are selected from such post, camp, station, or subordinate command, the commander of the installation or subordinate command should transmit timely recommendations to the convening authority as to the availability of members of his command (as affected by leave, reassignment, relief from active duty, or other matters) to act as personnel of any court to which they have been or may be appointed.

(2) *Enlisted members.*—When charges against an enlisted person have been referred to a general or special court-martial to which enlisted members have not been appointed, and, prior to the convening of the court for trial, the accused personally has requested in writing that enlisted persons serve on the court (61*g*, *i;* Art. 25*c*), the convening authority shall:

(*a*) Appoint a sufficient number of eligible enlisted persons to the court and, if appropriate, relieve a sufficient number of officers or warrant officers from the court to the end that at least one-third of the members who will actually participate in the trial of the case will be enlisted persons; or

(*b*) Withdraw the charges from the court to which they were originally referred and refer them to a court which is composed of the required percentage of eligible enlisted persons; or

(*c*) Advise the court before which the charges are pending to proceed with the trial in the absence of enlisted members if eligible enlisted persons cannot be obtained because of physical conditions or military exigencies. When this action is taken, the convening authority should transmit to the trial counsel, for inclusion in the record of trial, a detailed written statement of the reasons why enlisted persons could not be obtained for the trial of the case. (This statement may be transmitted to the trial counsel when the charges are referred to trial if the facts are known at that time.)

37. CHANGES IN PERSONNEL.—*a.* ***General.***—Subject to the exceptions stated below (37*b*), it is within the discretion of the convening authority to make changes in the composition of courts-martial appointed by him. For instance, he may appoint new members to a court in lieu of, or in addition to, the members of the original court; or he may appoint a new law officer, trial counsel, or defense counsel in lieu of the personnel designated to perform those respective duties by the original appointing order. When practicable, the convening authority should change the composition of courts-martial from time to time to provide the maximum opportunity to eligible personnel to gain experience in the administration of military justice.

b. ***Exceptions.***—No member of a general or special court-martial shall be absent or excused after the accused has been arraigned except for physical disability or as a result of a challenge or by order of the convening authority for good cause (Art. 29*a*). Military exigencies or emergency leave, among others, may constitute good cause for such a relief. The determination of facts which constitute good cause for the excuse from attendance or the relief of a member after arraignment rests within the discretion of the convening authority. Ordinarily, he should not appoint additional members to a general or special court-martial after the arraignment of an accused unless the court is reduced below a quorum; if practicable, he should excuse from future sessions of the court in a particular case any member who was absent when testimony on the merits was heard, or other important proceedings were had.

See 41*c* for procedure when a member is absent because of physical disability.

c. ***Manner in which effected.***—(1) *Formal changes.*—Permanent changes in the composition of a court-martial, such as changes which involve the appointment of new personnel to a court or the relief of a member, are usually accomplished by promulgation of formal written orders amending the original appointing order. If it is necessary to make a formal change by oral order, despatch, or signal, the oral order, despatch, or signal should be confirmed by written orders. For forms of amending orders, see appendix 4. Amendments of the original appointing order should be kept to a minimum. To avoid making a number of separate changes by the way of amendment, it is better practice to appoint a new court. Any unarraigned case which is pending before the old court may be withdrawn from it and referred to the new court. In appointing a new court, the old court should not be dissolved, nor the order appointing the old court rescinded or revoked, as it may be necessary to reassemble the old court for revision proceedings.

(2) *Informal changes.*—If the convening authority excuses a member or counsel from attendance at future sessions of a general or special court-martial in a particular case or series of cases, but does not desire to relieve him permanently as a member or counsel, he may take such action by oral order, despatch, or signal and need not confirm the action by a written order. See 41*c*, 44*b*, and 46*b*.

38. INSTRUCTING PERSONNEL OF COURT.—A convening authority may, through his staff judge advocate or legal officer or otherwise, give general instruction to the personnel of a court-martial which he has appointed, preferably before any cases have been referred to the court for trial. When a staff judge advocate or legal officer is present with the command such instruction should be given through that officer. Such instruction may relate to the rules of evidence, burden of proof, and presumption of innocence, and may include information as to the state of discipline in the command, as to the prevalence of offenses which have impaired efficiency and discipline, and of command measures which have been taken to prevent offenses. Except as provided in this manual, the convening authority may not, however, directly or indirectly give instruction to, or otherwise unlawfully influence, a court as to its future action in a particular case. In this connection, see 67*f*.

Convening authorities are expressly forbidden to censure, reprimand, or admonish a court appointed by them, or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. No person subject to the code shall attempt to coerce or by any unauthorized means influence the action of a court-martial or any other military tribunal, or any member thereof, in reaching the findings or sentence in any case. See Articles 37 and 98.

Chapter IX

PERSONNEL OF COURTS-MARTIAL

LAW OFFICER—PRESIDENT—MEMBERS—COUNSEL; GENERAL PROVISIONS—SUSPENSION OF COUNSEL—TRIAL COUNSEL—ASSISTANT TRIAL COUNSEL—DEFENSE COUNSEL—ASSISTANT DEFENSE COUNSEL—COUNSEL FOR THE ACCUSED—REPORTER—INTERPRETER—GUARDS, CLERKS, AND ORDERLIES

39. LAW OFFICER.—*a.* ***Selection.***—See 4*e* for qualifications of the law officer.

b. ***Duties.***—(1) *General.*—The law officer is responsible for the fair and orderly conduct of the proceedings in accordance with law in all cases which are referred to the court to which he is appointed. He may, after conferring with counsel (39*c*), make recommendations to the senior member of the court as to the time of assembly of the court for the trial of a case. During the trial, he rules upon all interlocutory questions except challenges (57) and advises the court on questions of law and procedure which may arise. His ruling upon any interlocutory question other than a motion for findings of not guilty or the question of the accused's sanity is final (57*d*). He is not a member of the court and does not vote with the members of the court upon a challenge or other interlocutory question properly referred to the court for decision, or upon the findings or sentence. Before the court closes to vote on the findings, he instructs it as to the elements of each offense charged, the presumption of innocence, reasonable doubt, and burden of proof (73), and may give it such additional instructions as will aid it in arriving at just findings, such as what lesser offenses, if any, are included in the offense charged and the possible findings the court may make by way of exceptions and substitutions. After the court has finally voted on the findings, he may, at the request of the court, assist it in putting the findings in proper form (74*f*; Art. 39). Before the court closes to vote upon a sentence, he should advise it as to the maximum authorized punishment for each offense of which the accused has been found guilty.

(2) *Interference in conduct of trial.*—The law officer may properly intervene in a trial of a case to prevent unnecessary waste of time or to clear up some obscurity. However, he should bear in mind that his undue interference or participation in the examination of witnesses, or a severe attitude on his part toward witnesses, may tend to prevent the proper presentation of the case, or hinder the ascertainment of the truth.

Consultation between the law officer and counsel in court is often necessary, but the law officer should avoid controversies which are apt to obscure the issues before the court. In addressing counsel, the accused, witnesses, or the court, he should avoid a controversial manner or tone. He should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment.

c. ***Record.***—All proceedings involving rulings or instructions made or given by the law officer during the course of a trial shall be made a part of the record and, except when the law officer assists the court in putting its findings in proper order, shall be made or given in open court in the presence of the accused and the counsel for the prosecution and defense. See Article 39. A conference between the law officer and the counsel for either side, or the senior member of the court, held outside of court for the purpose of discussing the time of the commencement or continuation of the trial, need not be made a part of the record. See 58*b* as to postponement of assembly of the court for a trial. See also 57*g* (2) for rules governing proceedings had outside the presence of members of a general court-martial with respect to preliminary evidence, offers of proof, and arguments as to the admissibility of proffered evidence, and 73*c* (2) for rules governing the preparation of additional instructions by the law officer.

d. ***Absence of law officer.***—The law officer must be present at all times during the trial of a case except when the court is closed to deliberate or vote (Art. 39). When the law officer is absent from any open session of the court during the trial of a case, the court will adjourn until either the law officer is present or a new law officer is regularly appointed and is present. In appropriate cases the court will report the absence of the law officer to the convening authority. If, before trial, it appears to a law officer that he should not sit on the court, either at all or in a particular case, for reasons enumerated in 62*f* or for other reasons, he will bring the matter to the attention of the convening authority.

e. ***New law officer.***—The law officer should not be changed during the progress of a trial except for a good reason. If a new law officer is appointed to the court in the course of a trial and is sworn (opportunity to challenge him for cause having been given), the trial may proceed after the substance of all proceedings have been made known to him and the recorded testimony of each witness previously examined has been read to him in the presence of the court, the accused, and counsel. However, see 80*b* for the procedure to be followed when a new law officer is present at revision proceedings.

f. ***Authentication of record.***—The law officer who was present at the conclusion of the proceedings in a case will authenticate the record of trial. See 82*f* in this connection.

40. PRESIDENT.—*a*. ***General.***—The senior in rank among the members appointed to a general or special court-martial is the president; however, the senior member present at a trial, whether or not he is the senior member appointed to the court, is president of the court for the trial of that case. See 40*c*.

b. ***Duties.***—(1) *General court-martial.*—The president of a general court-martial has the duties, powers, and privileges of members in general. He has the following additional powers and duties:

(*a*) After consultation with the trial counsel and, when appropriate, the law officer (58*b*), he sets the time and place of trial and prescribes the uniform to be worn.

(*b*) As the presiding officer of the court, he takes appropriate action to preserve order in the open sessions of the court in order that the proceedings may be conducted in a dignified, military manner, but, except for his right as a member to object to certain rulings of the law officer (57*d*, 118), he shall not interfere with those rulings of the law officer which affect the legality of the proceedings.

(*c*) He administers oaths to counsel.

(*d*) For good reason, he may recess or adjourn the court (e. g., 39*d*), subject to the right of the law officer to rule finally upon a motion or request of counsel that certain proceedings be completed prior to such recess or adjournment, or that a continuance be granted (58). Whether a matter of recess or adjournment has become an interlocutory question will be finally determined by the law officer (57*d*).

(*e*) He presides over closed sessions of the court and speaks for the court in announcing the findings and sentence and the result of any vote upon a challenge or other interlocutory question properly presented to the court for decision.

(*f*) He speaks for the members of the court in conferring with, or in requesting the advice of, the law officer upon any question of law or procedure.

(2) *Special court-martial.*—The president of a special court-martial is responsible for the fair and orderly conduct of the proceedings in accordance with law in all cases referred to the court. In addition to performing the duties prescribed for the president of a

general court-martial, he will rule upon all interlocutory questions except challenges, and, before the court closes to vote on the findings, will instruct the court as to the elements of each offense charged, the presumption of innocence, reasonable doubt, and burden of proof (73*a*, *b*). His rulings upon interlocutory questions may be objected to by any other member of the court (57*c*). With respect to the conduct of trials, he will be guided by the principles outlined in 39*b* (2).

c. ***Authentication of record.***—The senior member of the court who was present at the conclusion of the proceedings in a case will authenticate the record of trial as president. See 82*f* and 83*c* in this connection.

41. MEMBERS.—*a*. ***Selection.***—See 4*a* to *d*, inclusive, for qualifications of members of courts-martial.

b. ***Duties.***—Members of courts-martial hear the evidence, determine the guilt or innocence of the accused and, if the accused is found guilty, adjudge a proper sentence. Each member has an equal voice and vote with other members in deliberating upon and deciding all questions submitted to a vote or ballot, the senior member having no greater rights in such matters than any other member. In this connection, see 57*f*, 62*h* (3), 74*d*, and 76*b* (2). Members will be dignified and attentive. Although a court has no power to punish its members, improper conduct by a member, such as a refusal or failure to vote or properly to discharge any other duty under his oath or otherwise, is a military offense.

c. ***Absence of members.***—No member of a general or special court-martial may be absent from the court during the trial of a case except for physical disability, as a result of a challenge, or by order of the convening authority. If, before the assembly of the court for the trial of a case, it appears to a member that he should not sit on the court, either at all or in a particular case, for reasons enumerated in 62*f* or for any other reason except physical disability, he will take appropriate steps to bring the matter to the attention of the convening authority.

If he is able to do so, a member of a general or special court-martial who is, or has reason to believe that he will be, absent from a session of the court because of physical disability will so inform the trial counsel. The latter will make an informal inquiry to verify the cause of the absence and, if it occurs after the arraignment of the accused, will report his findings to the court (41*d* (4)).

d. ***Effect of absence.***—(1) *General.*—When less than a quorum (minimum number of members required by Article 16) is present, the court cannot be organized as such or proceed with a trial. Less than a quorum may adjourn until a prescribed time. When a quorum is present and one member is challenged, the remaining members may pass on the challenge.

(2) *Enlisted members.*—When, pursuant to Article 25*c*, an enlisted person requests participation of enlisted members in his trial by general or special court-martial, the court shall not proceed with his trial unless one-third of the members actually sitting on the court throughout his trial are enlisted members or the convening authority has directed that the trial be held without enlisted persons. See 4*c* and 36*c* (2).

(3) *Before arraignment.*—The unauthorized absence of a member of a general or special court-martial from a session of the court may be a military offense, but his absence prior to the arraignment of the accused will not prevent the court from proceeding with the trial if a quorum is present. However, the trial counsel will report any unauthorized absence of a member to the convening authority.

(4) *After arraignment.*—If a member who was present at the arraignment of the accused is absent from a future session of the court in the same case, the court may proceed only if a quorum remains and the absence is the result of a challenge, physical disability, or the order of the convening authority for good cause. As to the latter, see 37*b*. In determining whether a member is absent because of physical disability, the court may accept the statement of the trial counsel as to the results of his informal inquiry into the cause of absence (41*c*) or it may require the trial counsel to procure and present other evidence, such as a certificate from a physician or a proper official as to the illness of the absent member. To determine whether a member is absent by order of the convening authority, the court may accept the statement of the trial counsel that he has been advised by oral order, signal, or despatch that the member has been excused by the convening authority from further attendance in the case (37*c*).

e. ***New member of general court-martial.***—When a member who was previously absent from, or who has been newly appointed to, a general court-martial has been sworn (opportunity to challenge him having been given), the trial may proceed after the substance of all proceedings had shall have been made known to him and the recorded testimony of each witness previously examined has been read to him in the presence of the law officer, the accused, counsel, and the other members of the court. See Article 29*b*.

f. ***New member of special court-martial.***—When a member who was previously absent from, or who has been newly appointed to, a special court-martial has been sworn (opportunity to challenge him having been given), the trial shall proceed as if no evidence had previously been introduced, unless the substance of all proceedings had shall have been made known to him and a verbatim record of the testimony of previously examined witnesses or a stipulation thereof is read to the court in the presence of the accused and counsel. See Article 29*c*.

42. COUNSEL; GENERAL PROVISIONS.—*a. **Definition of terms.***—The term "counsel" as used in this manual will be interpreted to include, unless otherwise indicated by the context, the appointed trial counsel and defense counsel of a general or special court-martial and their assistants, if any, and any individual counsel (civilian or military). Whenever the term "trial counsel" is mentioned, it will be understood to refer to the appointed trial counsel of a general or special court-martial and to include, unless otherwise indicated by the context, assistant trial counsel, if any. Whenever the terms "defense counsel" or "counsel for the accused" are used, they are to be understood to include, unless otherwise indicated by the context, the appointed defense counsel, appointed assistant defense counsel, if any, and any individual counsel. The term "individual counsel" shall be understood to refer to military counsel selected by the accused or to civilian counsel provided by him.

*b. **General rules of conduct.***—In performing their duties before courts-martial, counsel should maintain a courteous and respectful attitude toward the law officer, the members of the court, and opposing counsel, and should treat adverse witnesses and the accused with fairness and due consideration. Personal colloquies between counsel which cause delay or promote unseemly wrangling should be carefully avoided. The conduct of counsel before the court and with each other should be characterized by candor and fairness. Counsel should not knowingly misquote the contents of a paper, the testimony of a witness, the language or argument of opposing counsel, or the language of a decision or a textbook; nor, with knowledge of its invalidity, should counsel cite as authority a decision that has been reversed or an official directive of the Department of Defense or any of the Departments, or one of their agencies, bureaus, branches, forces, commands, or units, that has been changed or rescinded. As publication in the public press, or on the radio or television, of the circumstances of a pending case may interfere with a fair trial and otherwise prejudice the due administration of justice, counsel should refrain from discussing such circumstances with representatives of the press, radio, or television unless authorized by the convening authority or other competent superior authority.

*c. **Interviewing witnesses.***—Counsel may properly interview any witness or prospective witness for the opposing side in any case without the consent of opposing counsel or the accused. See 44*h* as to relations between the prosecution and the accused. In interviewing a witness, counsel should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth when appearing as a witness at the trial. See Article 31.

43. SUSPENSION OF COUNSEL.—Rules defining professional or personal misconduct which disqualify a person from acting as counsel before courts-martial may be announced by the Judge Advocates General of the armed forces in appropriate departmental regulations which shall provide for notice and opportunity to be heard and will also establish procedures to provide for the suspension of persons from acting as counsel before courts-martial. When any person acting as counsel before a court-martial is guilty of professional or personal misconduct, action may be taken by a convening authority, in accordance with such regulations, to recommend suspension of the person affected from practice as counsel before courts-martial of the armed force concerned. Suspension will not be effected except by the Judge Advocate General of the armed force concerned. The Judge Advocate General concerned may, upon good cause shown, modify or revoke a prior order of suspension.

44. TRIAL COUNSEL.—*a.* ***Selection.***—See 6 for qualifications of trial counsel.

b. ***Disqualification.***—Whenever it appears to the court or to the trial counsel himself that any member of the prosecution named in the appointing order is for any reason, including misconduct, bias, prejudice, hostility, previous connection with a particular case, or lack of legal qualifications (for general courts-martial), disqualified or unable properly and promptly to perform his duties, a report of the facts will be made at once to the convening authority and appropriate action taken to insure that the disqualified member shall not act for the prosecution.

c. ***Absence.***—For a proper reason (e. g., preparation of another case) the convening authority or the president may excuse from attendance during a trial or trials such of the personnel of the prosecution as will not be required.

d. ***General duties.***—The trial counsel shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings (Art. 38*a*). When charges are referred to him for trial, it is his duty to bring them promptly to trial before the court indicated in the reference for trial. In general, he may bring cases to trial in such order as he deems expedient. He will be given ample opportunity to prepare properly the prosecution of each case.

e. **Reports.**—(1) *Status of cases on hand.*—Unless otherwise directed by the convening authority, he will submit a weekly report to the latter through the president of a special court-martial or the law officer of a general court-martial, in which, in addition to such matter as may be required by the convening authority, will be included a statement of the reasons for delay in disposing finally of cases that have been on hand for over two weeks.

(2) *Result of trial.*—Upon final adjournment of the court in a case, the trial counsel will, in writing, notify the immediate commanding officer of the accused of the result, including any findings reached and any sentence imposed by the court. Unless otherwise directed by the convening authority, the trial counsel will furnish a copy of this report to the convening authority and, if the accused is in confinement, to the commanding officer to whose command the place of confinement is subject. Immediate action will be taken to release the accused in the event the trial results in an acquittal or in a sentence not involving confinement. See 21*d* and 22 in this respect.

f. **Duties prior to trial.**—(1) *Examination of file.*—He will report to the convening authority any substantial irregularity in the order appointing the court or in the charges or accompanying papers. If the membership of the court to which the case is referred is reduced below a quorum for any reason or if the trial counsel has good reason to anticipate such a reduction, he will report the facts through appropriate channels to the convening authority. See 36*c* (1). Ordinarily he will correct and initial slight errors or obvious mistakes in the charges, but will not without authority make any substantial change therein. See 33*d* and *e* (2). He will take proper action to assure that the data on the charge sheet and any evidence of previous convictions are complete and free from errors of substance or form.

(2) *Notification of personnel; witnesses.*—Unless otherwise directed by the president or unless obviously unnecessary, he will give timely oral or written notice to the members of the court and to all others concerned (including the officer, if any, whose duty it is to see that the accused attends) of the date, hour, and exact place of any meeting of the court. He may include in this notice such other matter as the president may direct, such as a statement of the uniform to be worn. Prior to trial he will notify and arrange to have present at the trial witnesses who are to testify in person (including witnesses desired by the defense) and the reporter and interpreter if required. Before deciding that the presence of any particular witness is necessary, he should first consider whether the evidence which the witness is expected to give is material and necessary and whether a depo-

sition will properly answer the purpose. See Article 49. If in disagreement with the defense counsel as to whether the attendance of a witness requested by the defense is necessary, he will report the matter to the convening authority in the manner prescribed in 115*a*.

(3) *Preparing for trial.*—Before the court assembles he will obtain a suitable room for the court, see that it is in order, procure requisite stationery, prepare a copy of the charges and specifications for each member of the court and the law officer, and take such other action as will enable him to make a prompt, full, and systematic presentation of the case at the trial. As to each offense charged, the burden is on the prosecution to prove beyond a reasonable doubt by competent evidence that the offense was committed, that the accused committed it, that he had the requisite criminal intent at the time, and that the accused is within the jurisdiction of the court, except to the extent that such burden is relieved by a plea of guilty. Whatever the defense may be, this burden never changes. Proper preparation to meet this burden includes a consideration of the essential elements of the offense and of the pertinent rules of evidence, to the end that only competent evidence will be introduced at the trial, and requires a determination of the order in which the evidence will be introduced. In general, evidence should be presented in sequence of events as nearly as practicable, and, when several offenses are charged, especially if unrelated, the evidence should be directed to the development of their proof in the order charged so that neither the court nor the accused may be in doubt at any time as to the offense to which the evidence being introduced refers. If evidence is to be presented out of proper sequence to suit the convenience of witnesses or for other reasons, the trial counsel may invite the attention of the court to the anticipated deviation.

(4) *Legal research.*—If he finds that the provisions of this manual do not clearly settle a question likely to arise at the trial, he should endeavor to secure for use at the trial authorities to sustain his contentions, such as pertinent decisions of the courts or authoritative military precedents. To secure these authorities he may communicate with the convening authority.

(5) *Reporting inadvisability of trial.*—If, while preparing a case, he discovers a matter which in his opinion makes it inadvisable to bring the case to trial he will inform the convening authority at once, provided it is reasonably apparent that the matter was not known to the convening authority when the charges where referred for trial. For example, such action would be appropriate when the trial counsel discovers that there has not been a substantial com-

pliance with Article 32, and it appears that the accused may be prejudiced thereby, or that the accused was or is insane, or that the only witness to an essential fact has disappeared or repudiates the substance of the testimony expected from him.

g. ***Duties during trial.***—(1) *General.*—He executes all orders of the court. Under the direction of the court he keeps or superintends the keeping of the required record of proceedings.

Although his primary duty is to prosecute, any act (such as the conscious suppression of evidence favorable to the defense) inconsistent with a genuine desire to have the whole truth revealed is prohibited. With a view to saving time and expense, he should join in appropriate stipulations as to unimportant or uncontested matters. See 154*b* (Stipulations).

While the court is in open session, he should respectfully call its attention to any apparent illegalities or irregularities in its action or in the proceedings.

He will take care that any papers in his possession which relate to a case referred to him for trial and which are not in evidence are not exposed to any risk of inadvertent examination by members of the court; nor will he bring to the attention of the court any intimation of the views of the convening authority, or those of the staff judge advocate or legal officer, with respect to the guilt or innocence of the accused, appropriate sentence, or concerning any other matter exclusively within the discretion of the court. See Article 37.

Aside from opinions expressed in the proper discharge of his duty to prosecute (e. g., in his closing argument or in an argument on a motion or on the admissibility of evidence), he should not give the court his opinion upon any point of law arising during the trial except in open court when it is requested by the law officer (president of a special court-martial). It is improper for him to assert before the court his personal belief as to the guilt or innocence of the accused. When he addresses the court he will rise.

(2) *Presentation of the case.*—After the pleas, the trial counsel will, to the extent required by the law officer (president of a special court-martial), read the parts of this manual or of authoritative precedents that are pertinent to the definition and proof of any offense charged and to the defense thereto.

He may make an opening statement—that is, a brief statement of the issues to be tried and what he expects to prove—but will avoid including or suggesting matters as to which no admissible evidence is available or intended to be offered. Ordinarily such a statement is made immediately before the introduction of evidence for the prosecution, but in exceptional cases the court may, in its discretion, permit like statements to be made at later stages of the proceedings.

On behalf of the prosecution he conducts the direct and redirect examination of the witnesses for the prosecution and the cross and recross-examination of the witnesses for the defense. He will, unless the law officer (president of a special court-martial) otherwise directs, conduct the direct and redirect examination of witnesses called by the court, and if such witnesses are adverse to the prosecution, may conduct the cross-examination on behalf of the prosecution.

See 72 as to closing arguments.

h. ***Relations with the accused and his counsel.***—Except to the extent that this manual may otherwise require, it is not his duty to assist or advise the defense.

Immediately upon receipt of charges referred to him for trial he will serve a copy of the charge sheet, as received and corrected by him, on the accused and will inform the defense counsel of the court that such copy has been so served. Except as otherwise directed by the convening authority, he will permit the defense to examine from time to time any paper accompanying the charges, including the report of investigation and papers sent with the charges on a rehearing. He will also permit the defense to examine from time to time the order appointing the court and all amending orders. Prior to trial, he should advise the defense of the probable witnesses to be called by the prosecution, and the fact that the defense has not been so advised with respect to a witness who appears at the trial may be a ground for a continuance.

His dealings with the defense should be through any counsel the accused may have. Thus, if he desires to know how the accused intends to plead or whether an enlisted accused desires enlisted members on the court, he will ask the regularly appointed defense counsel or other counsel, if any, of the accused. He will not attempt to induce a plea of guilty.

The trial counsel will furnish every person tried by the court a copy of the record of the proceedings as soon as it is authenticated. In this connection, see 82*g* (1) and 83*d* (Disposition—Delivery to accused).

i. ***Duties after trial.***—See 82 and 83 for rules governing the preparation, authentication, and disposition of the record of trial.

45. ASSISTANT TRIAL COUNSEL.—*a.* ***General court-martial.***—Unless he is disqualified by reason of prior participation in the case (6*a*), any person named in the appointing order as an assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by Article 27*b*, perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. See Article 38*d*. He will perform those duties in connection with trials which the trial counsel may designate. Except when the contrary affirmatively appears of record, all duties performed outside of court by the assistant trial counsel of a general court-martial shall be deemed to have been performed under the direction of the trial counsel; however, an assistant trial counsel who is not qualified to be a trial counsel as required by Article 27*b* may not perform duties in connection with the conduct of the prosecution of a case during the open sessions of a general court-martial except in the presence of a trial counsel or assistant trial counsel who is so qualified. See 6*a* and *d* for rules as to when the conduct of the prosecution devolves upon an assistant trial counsel.

b. ***Special court-martial.***—Unless he is disqualified by reason of prior participation in the case, any person named in the order as an assistant trial counsel of a special court-martial may perform any duty of the trial counsel. See Article 38*d*. He will perform those duties in connection with trials which the trial counsel may designate.

46. DEFENSE COUNSEL.—*a*. ***Selection.***—See 6 for qualifications of defense counsel.

b. ***Disqualification.***—A report of facts will be made at once to the convening authority for his appropriate action, whenever it appears to the court or to the defense counsel himself that any member of the defense named in the appointing order is for any reason, including unfitness, bias, prejudice, hostility toward the accused, lack of legal qualifications, or previous connection with the same case, unable promptly to perform his duties in any case.

c. ***Absence.***—For a proper reason (e. g., preparation of another case) the president may, with the express consent of the accused, excuse from attendance during a trial such of the personnel of the defense as will not be required. See Article 38*b*.

d. ***General duties.***—When the defense is not in charge of individual counsel (42*a*) the duties of defense counsel are those outlined in 48. When the defense is in charge of individual counsel, civil or military, the duties of defense counsel as associate counsel are those which the individual counsel may designate.

When charges are referred to a court for trial the defense counsel will inform the accused immediately that he has been appointed to defend him at the trial, explain his general duties, and advise him of his right to select individual counsel, civil or military, of his own choice pursuant to Article 38*b*. If the accused expresses a desire to be represented by individual counsel, the defense counsel will immediately report the fact to the convening authority, through the trial counsel, and take appropriate steps to secure and consult the requested counsel and, if the accused desires, act as associate counsel. Unless the accused otherwise desires, the defense counsel will undertake the immediate preparation of the defense without waiting for the appointment or retaining of any individual counsel.

47. ASSISTANT DEFENSE COUNSEL.—Unless he is disqualified by reason of prior participation in the case (6*a;* Art. 27*a*), any person named in the order as an assistant defense counsel of a general or special court-martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by Article 27, perform any duty imposed by law, regulations, or custom of the service upon counsel for the accused. See Article 38*e*. Unless in charge of the defense, he will perform those duties in connection with the trial that the counsel in charge of the defense may designate. Except when the contrary affirmatively appears of record, all duties performed outside of court by the assistant defense counsel shall be deemed to have been performed under the direction of the counsel in charge of the defense; however, unless he has been selected by the accused as individual counsel, an assistant defense counsel who is not qualified to be defense counsel as required by Article 27 may not perform duties in connection with the conduct of the defense of a case during the open sessions of a general or special court-martial except in the presence of a defense counsel or assistant defense counsel who is so qualified, or in the presence of individual counsel. See 6*a* and *d* for rules as to when the conduct of the defense devolves upon an assistant defense counsel.

48. COUNSEL FOR THE ACCUSED.—*a. **Statutory right to counsel of his own choice.***—The accused shall have the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel duly appointed pursuant to Article 27. Should the accused have counsel of his own selection, the duly appointed defense counsel and assistant defense counsel, if any, shall, if the accused so desires, act as his associate counsel; otherwise they shall be excused by the president of the court (Art. 38*b*). Civilian counsel will not be provided at the expense of the Government. Military personnel on active duty or persons employed by the armed forces shall not solicit or accept fees of any kind from an accused as reimbursement for acting as his counsel before a court-martial or before any of the appellate agencies concerned with the administration of justice under the code.

b. ***Detail of individual military counsel.***—The application for the detail of a person requested by the accused as military counsel may be made by the accused or by anyone on his behalf, but it is usually forwarded by the defense counsel, through the trial counsel, to the convening authority. The convening authority will take the following action:

(1) If the requested counsel is reasonably available within his command, he will make the detail and order any necessary travel.

(2) If the requested counsel is not under his command, he will take prompt action to ascertain whether the requested counsel is reasonably available and, if so, to obtain his services.

(3) If he determines that the requested counsel is not reasonably available, he will so advise the accused.

A person who has acted as a member of the prosecution in the same case, or who has been named in the appointing order as the trial counsel or assistant trial counsel in the case, shall be deemed not to be available for detail as individual counsel. See 6*a* and Article 27. The decision of the convening authority as to the availablity of the requested counsel is subject to revision by his next superior authority on appeal by or on behalf of the accused. A military person who has been made available to act as individual counsel will, so far as is practicable, be relieved of all other duties which may interfere with the proper preparation and presentation of the accused's case.

c. ***Duties in general.***—An officer or other military person acting as counsel for the accused before a general or special court-martial will perform such duties as usually devolve upon the counsel for a defendant before a civil court in a criminal case. He will guard the interests of the accused by all honorable and legitimate means known to the law. It is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused; to disclose to the accused any interest he may have in connection with the case, any ground of possible disqualification, and any other matter which might influence the accused in the selection of counsel; to represent the accused with undivided fidelity, and not to divulge his secrets or confidence. It is improper for him to assert in argument his personal belief in the innocence of the accused or to tolerate any manner of fraud or chicane.

When a defense counsel is designated to defend two or more co-accused in a joint or common trial, he should advise them of any conflicting interests in the conduct of their defense which would, in his opinion, warrant a request on the part of any of the accused for other counsel.

d. ***Securing witnesses.***—He should make timely request to the trial counsel to secure the attendance of defense witnesses, and with a view to saving time, labor, and expense, he should cooperate with the trial counsel in the preparation of depositions and in appropriate stipulations as to unimportant or uncontested matters. See 154*b* (Stipulations).

e. ***Request for enlisted members for the court.***—Before the trial he will advise an accused enlisted person of his right to have enlisted persons as members of the court. See Article 25*c*. If the accused elects to exercise this right, the defense counsel will prepare the written request required by Article 25*c*, have it signed by the accused, and forward it without delay, through the trial counsel, to the convening authority or to the court if trial is imminent.

f. ***Consultation with the accused.***—He will explain to the accused the meaning and effect of a plea of guilty and his right to introduce evidence after such plea (70; app. 8*a*); his right to testify or to remain silent (148*e*, 149*b*; app. 8*a*); his right, after findings are announced, to make an unsworn statement and to introduce evidence as to matters in extenuation and mitigation (75*c*, 139*b*; app. 8*a*); and his right to assert any proper defense or objection, such as the statute of limitations in an appropriate case (68*c*, 74*h*). These explanations will be made regardless of the intentions of the accused as to testifying or as to how he will plead. Counsel should endeavor to obtain full knowledge of all the facts of the case before advising the accused, and he is bound to give the accused his candid opinion of the merits of the case.

g. ***Preparation for trial.***—Ample opportunity will be given the accused and his counsel to prepare the defense, including opportunities to interview each other and any other person. See 42*c* and 44*h*. Counsel's preparation for trial should include a consideration of the essential elements of each offense charged and of the pertinent rules of evidence, to the end that the evidence he proposes to introduce in defense may be confined to competent evidence, and that he may be ready to make appropriate objection to any incompetent evidence that might be offered by the prosecution. If practicable, he should plan to introduce the defense evidence in sequence of events and to defend against the alleged offenses in the order charged. When he addresses the court, he will rise.

The provisions of 44*f* (4) apply equally to counsel for the defense.

h. ***Presentation of the defense.***—Counsel may make an opening statement for the defense similar to that indicated in 44*g* (2). This statement is ordinarily made just after the prosecution has rested or immediately following the opening statement of the trial counsel, but in exceptional cases the court may, in its discretion, permit it or other like statements to be made at other stages of the proceedings.

On behalf of the defense, he conducts the direct and redirect examination of witnesses for the defense. He conducts cross and recross-examination of prosecution witnesses and of witnesses called by the court if they are adverse to the defense.

See 72 as to closing arguments.

i. ***Absence of accused.***—When the trial proceeds after the accused has voluntarily absented himself without authority (11), the counsel should continue to represent the accused.

j. ***Duties after trial.***—(1) *Clemency petition.*—At the close of the trial or as soon thereafter as practicable, if the accused is found guilty, the defense counsel shall, in a proper case, prepare a recommendation for clemency setting forth any matters as to clemency which he desires to have considered by the members of the court or the reviewing authority. He shall secure the signatures of those members of the court who have indicated their willingness to sign the recommendation, and shall submit it to the trial counsel for attachment to the record of trial. See 77*a*.

(2) *Appellate brief.*—In every court-martial proceeding, the defense counsel may, in the event of conviction, forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he may deem appropriate (82*e*; Art. 38*c*).

(3) *Advising accused of appellate rights.*—In the event the accused is convicted, the defense counsel will, immediately after trial, advise him generally of his appellate rights. For example, he should advise him of his right to be represented before the board of review and, in an appropriate case, he will assist the accused to secure such appellate representation by preparing a letter for the signature of the accused, addressed to the appellate defense counsel, or by other appropriate means. Although direct communication with the appellate defense counsel is authorized, a request for appellate representation ordinarily will be forwarded to the convening authority in order that it may be attached to the record of trial. The accused shall have 10 days from the date the sentence is adjudged in his case to forward a request that he be represented by appellate counsel before a board of review. Such a request should be made conditional upon the record being referred to a board of review under the provisions of Article 66 or Article 69. The failure of the accused to forward within 10 days a request for such representation may be regarded as a waiver of his

right to appellate counsel before the board of review, if such board has taken its final action in the case prior to receipt of such request. The defense counsel should also advise the accused of any right he may have to appeal to the Court of Military Appeals and to be represented before that court by appellate defense counsel. See 102 in this connection.

(4) *Examination of record.*—See 82*e* for duties in connection with examination of the record of trial.

49. REPORTER.—*a.* ***Authority for appointment.***—See 7 for the authority for, and the manner of, appointment and 33*k* as to the manner of directing that a reporter not be used in a special court-martial.

b. ***Duties.***—(1) *General.*—He shall record the proceedings of and testimony taken before courts-martial, courts of inquiry, or military commissions for which he is appointed (Art. 28) and may set down the same in the first instance in longhand, shorthand, or by mechanical or sound recording device. If a question is raised at trial as to whether any particular matter is included in the term, "proceedings of and testimony taken," the court will determine the question in accordance with applicable law and regulation. There will be no "off the record" discussions in open court or when the law officer is conferring with the court with respect to the form of the findings in closed session. See Article 39. The reporter will follow the forms prescribed for the preparation of records contained in appendix 9 and will be familiar with the provisions of 82. He will discharge his duties as promptly as practicable under the circumstances.

(2) *Copies of record.*—In general and special court-martial cases in which the sentence adjudged affects a general or flag officer, or includes death, dismissal, dishonorable or bad conduct discharge, or confinement for one year or more, the reporter will prepare an original and two copies of each record and of all documentary exhibits received in evidence, and additional copies of each record and of all documentary exhibits equal to the number of accused tried. In all other general and special court-martial cases, the reporter will prepare an original of each record and of all documentary exhibits received in evidence and copies of each record and of all documentary exhibits equal to the number of accused tried.

In any general or special court-martial case, the convening authority may direct that additional copies of the record and of documentary exhibits be prepared.

(3) *Oath; compensation.*—See 114 as to oath and appropriate departmental regulations as to compensation.

50. INTERPRETER.—*a. **Authority for appointment.***—See Article 28. See 7 for the authority for, and the manner of, appointment and 53*i* for the rule as to appointment of an interpreter for an accused who does not understand the English language.

*b. **Duties; oath; compensation.***—He shall interpret for the court, commission, or the accused. In questioning a witness through an interpreter the question should be put in the same interrogatory form as when questioning a witness not through an interpreter. The interrogator, for example, will ask, "What is your name?" rather than state to the interpreter, "Ask the witness what his name is." The interpreter should translate questions and answers as given to him. Thus, if the question is, "What is your name?" the question should be asked in the language of the witness, and the interpreter should not use such a form as, "They want to know what your name is."

See 114 as to oath and appropriate departmental regulations as to compensation.

51. GUARDS, CLERKS, AND ORDERLIES.—When appropriate, the convening authority or (if the trial is to be held at a distance) the commanding officer of the post, camp, or station where the trial is to be held will provide guards and detail suitable enlisted persons as clerks and orderlies to assist the members and officers of the court.

Chapter X

GENERAL PROCEDURAL RULES

REFERENCE TO CONVENING AUTHORITY—MISCELLANEOUS MATTERS—INTRODUCTION OF EVIDENCE—ACTION WHEN EVIDENCE INDICATES AN OFFENSE NOT CHARGED—WITHDRAWAL OF SPECIFICATIONS — INTERLOCUTORY QUESTIONS OTHER THAN CHALLENGES—CONTINUANCES

52. REFERENCE TO CONVENING AUTHORITY.—Whenever a matter as to future proceedings in a trial by court-martial is referred to a convening authority exercising general court-martial jurisdiction, he will refer the matter to his staff judge advocate or legal officer for consideration and advice.

53. MISCELLANEOUS MATTERS.—*a.* ***Order of proceedings.***—The chronological order of the usual proceedings in trials by general and special courts-martial is indicated in the guide to procedure in appendix 8 and in the forms of records in appendices 9 and 10.

b. ***Proceedings in each case to be complete.***—In each case the proceedings and the record thereof must be completed without reference to any other case. For example, if several accused, who are to be tried at separate trials by the same court, are present while the personnel of the court, counsel, and the reporter are sworn (112*c*; app. 8; Art. 42), the fact that the required oaths were administered in the presence of an accused must be shown in his record of trial and not by reference to the record of trial of one of the other accused.

c. ***Joint and common trials.***—In joint trials (26*d*) and in common trials (33*l*) each of the accused must in general be accorded every right and privilege which he would have if tried separately. For example, each accused may, if he desires, be defended by individual counsel, make individual challenges for cause (62*h*), make individual peremptory challenges (62*e*), cross-examine witnesses, testify in his own behalf, introduce evidence in his own behalf, and, if an enlisted person, make an individual request that the membership of the court include enlisted persons (4*a*, 61*g*). In a joint or common trial, both court and counsel must be careful to notice evidence which is admissible against only one or some of the joint or several accused and consider it only against such accused. For example, see 140*b* (Confessions). When the evidence is equally applicable to several or all accused, however, needless repetition may be avoided by the use of appropriate language and consolidation of evidence pertinent to all accused.

d. **Sessions.**—A general or special court-martial will sit in closed sessions during the deliberation and voting upon the findings and sentence, and upon interlocutory questions, including challenges. Only the members of the court who are to vote shall be present at such closed sessions. See 62*h* (3) with regard to voting on challenges. After a general court-martial has finally voted on the findings, the court may request the law officer and the reporter to appear before the court in closed session to put the findings in proper form, and such proceedings shall be on the record. See 74*f* (1) for procedure. All other proceedings, including any other consultation of the court with counsel or the law officer, shall take place in open session, shall be made a part of the record, and shall be conducted in the presence of the accused, the defense counsel, the trial counsel, and, in general court-martial cases, the law officer. See Article 39. See 57*g* (2) and 73*c* (2) for rules governing certain proceedings had outside the presence of members of a general court-martial.

e. **Spectators; publicity.**—As a general rule, the public shall be permitted to attend open sessions of courts-martial. Unless otherwise limited by departmental regulations, however, the convening authority or the court may, for security or other good reasons, direct that the public be excluded from a trial. When practicable, notices of the time and place of sessions of courts-martial will be published so that persons subject to the code may be afforded opportunity to attend as spectators provided attendance does not interfere with the performance of their duties. See also 118 (Contempts).

The taking of photographs in the courtroom during an open or closed session of the court, or broadcasting the proceedings from the courtroom by radio or television will not be permitted without the prior written approval of the Secretary of the Department concerned.

f. **Witnesses.**—Ordinarily, witnesses other than the accused should be excluded from the courtroom except when they are testifying. To prevent the false shaping of testimony through collusion, coercion, or other means, the court, upon its own motion or upon motion of counsel, may instruct a witness to refrain from discussing his testimony or prospective testimony with anyone except counsel or the accused in the case. See appendix 8 for form of instruction.

g. **Opportunity to present and support contentions.**—Both sides are entitled to an opportunity properly to present and support their respective contentions upon any question or matter presented to the court for decision. Restricting argument, particularly in long and complicated cases, or an arbitrary refusal to entertain argument on an interlocutory question, may constitute error; however, the right to present argument should not be abused, and the court may in its discretion limit or refuse to hear argument when it is trivial, mere repetition, or made for the purpose of delay. Arguments throughout the trial may be oral, in writing, or both. See 82*b* (4) in this connection.

h. ***Explanation of rights of accused.***—Ordinarily, the court need not volunteer advice to the accused during the course of the trial as it may be assumed that his counsel has performed his duties properly, has advised the accused of his rights and the law affecting the case, and that, for reasons best known to them, they desire to pursue a certain course. When deemed necessary, the court will cause to be explained to the accused any right which he appears not to understand. The right of the accused with respect to Article 43 (Statute of limitations (68*c*)), the meaning and effect of a plea of guilty (70), the right to remain silent or to testify as a witness (148*e*, 149*b*; Art. 31), and, after any finding of guilty is announced, to make a statement (75*c*) will, when applicable, be explained in open court unless it otherwise affirmatively appears of record that the accused is aware of his rights in the premises. See appendix 8*a* for forms of instructions. Whenever it appears warranted, the court should advise the accused of his right to testify for a limited purpose. For example, if it appears that the accused does not understand his right to testify for the limited purpose of showing the circumstances under which a confession was obtained without subjecting himself to cross-examination on the issue of guilt or innocence, an explanation should be made by the court. See 140*a* and 149*b*.

i. ***Right of accused to interpreter.***—Upon a showing by the defense that the accused does not understand the English language and desires the services of an interpreter, the court will direct the trial counsel to take appropriate action to provide the accused with a competent interpreter. The latter will interpret for the accused all proceedings had in open court and all testimony given in any language other than that understood by the accused. The interpreter will be sworn before entering upon his duties. See 114 for form of oath.

54. INTRODUCTION OF EVIDENCE.—*a.* ***Presentation of the case.***—Witnesses are usually examined in the following order: Witnesses for the prosecution, witnesses for the defense, witnesses for the prosecution in rebuttal, witnesses for the defense in rebuttal, witnesses for the court. The order of examining each witness is usually direct examination, cross-examination, redirect examination, recross-examination, and examination by the court. In a general court-martial, the examination by the court is ordinarily conducted by the law officer; thereafter, if necessary, members of the court may ask questions of the witness. The court should protect every witness from improper questions, harsh or insulting treatment, and unnecessary inquiry into his private affairs. See 150 and Article 31 for questions which a witness cannot be required to answer over his objection. See also 148, 149, 151, and 153 for other rules respecting the examination of witnesses.

b. ***Responsibility of the court.***—The court is not obliged to content itself with the evidence adduced by the parties. When such evidence appears to be insufficient for a proper determination of the matter before it, or when not satisfied that it has received all available admissible evidence on an issue before it, the court may take appropriate action with a view to obtaining available additional evidence. The court may, for instance, require the trial counsel to recall a witness, to summon new witnesses, or to make an investigation or inquiry along certain lines with a view to discovering and producing additional evidence.

c. ***Exclusion of improper evidence.***—When proffered evidence would be excluded on objection, the court may in its discretion bring the matter to the attention of any party entitled, but failing, to object to its admission. Such action is particularly important when improper questions are asked by a member of the court, or when improper testimony is elicited by questions asked by a member of the court—the reason for this being the natural hesitancy of the parties to object to a question asked by a member of the court and the weight likely to be given to testimony elicited through questions by the court. In the interest of justice, a court may always of its own motion exclude inadmissible evidence.

Rules of evidence are stated in chapter XXVII and in various connections throughout this manual; for example, in 122*c* (Insanity), 162 (Fraudulent enlistment), and 164 (Desertion).

d. ***Documentary evidence.***—In its discretion the court may direct that a document, although excluded as not admissible in evidence, be marked for identification and appended to the record for the consideration of the convening authority, and the court will so direct on request of the party offering the document. See 154*c* (Offer of proof).

When a document, such as an original record, which must or should be returned to the source from which it was obtained, is received in evidence or marked for identification, a suitable copy or extract copy thereof, certified as such by the trial counsel, will be substituted for such document and it will then be returned. Similar action may be taken to substitute an accurate description for an item of real evidence which must be returned to its source or is too bulky for inclusion in the record of trial. In this connection, see 138*c* (Real evidence).

e. ***Views and inspections.***—In exceptional circumstances, the court, in the exercise of its sound discretion may proceed to view or inspect the premises or place or an article or object if such view or inspection is necessary to enable the members better to understand and apply the evidence in the case. The proceeding is authorized only if conducted in the presence of counsel, the accused, and, in general court-martial cases, the law officer. The view should not be undertaken if the court is already familiar with the premises involved, or if photographs, diagrams, or maps adequately present the situation. The court may be escorted to the view by any person familiar with the premises and objects. The escort, without making any statement in the nature of evidence or argument, may point out particular features to be noted by the court. Before entering on his duties as escort, he will take the oath or affirmation prescribed in 114.

The members may consider and apply the evidence in the light of the knowledge obtained by their inspection. The court should not hear witnesses or take evidence at the view, but anything said thereat by counsel, the authorized escort, or the court will be recorded verbatim and constitute a part of the record of trial in any general court-martial case or in any special court-martial case in which a verbatim record is taken. Re-enactments of the events involved or acts alleged to have been committed are not authorized upon a view.

The fact that a view or inspection has been made does not preclude the introduction in evidence of photographs or diagrams of articles or objects viewed, nor of maps or sketches of the premises or place viewed, if such evidence is otherwise admissible.

f. ***Inquiry into mental status.***—See 122 for action by the court when it appears that further inquiry into the mental responsibility of the accused is warranted in the interest of justice.

55. ACTION WHEN EVIDENCE INDICATES AN OFFENSE NOT CHARGED.—*a.* ***General.***—If at any time during the trial it becomes manifest to the court that the available evidence as to any specification is not legally sufficient to sustain a finding of guilty thereof or of any lesser included offense thereunder, but that there is substantial evidence, either before the court or offered, tending to prove that the accused is guilty of some other offense not alleged in any specification before the court, the court may, in its discretion, either suspend trial pending action on an application by the trial counsel to the convening authority for direction in the matter or it may proceed with the trial. In the latter event a report of the matter may properly be made to the convening authority after the conclusion of the trial.

b. ***Examples.***—Application of this rule would be appropriate when in a trial for the larceny of a watch the proof shows that the article taken was a compass, or when in a trial for the wrongful sale of property (Art. 108) the proof shows that the accused negligently lost the property.

c. ***Trial of new charges.***—In any such case, if charges for the offense indicated by the evidence are preferred and are referred for trial, they should be referred to a court none of whose members has participated in the former trial.

56. WITHDRAWAL OF SPECIFICATIONS.—*a.* ***General.***—The convening authority may direct the prosecution to make a declaration of record that a certain specification and, when appropriate, the charge under which it is laid is withdrawn and will not be pursued further at that trial. A specification will be withdrawn only when directed by the convening authority who may give such direction either on his own initiative or on application duly made to him. The convening authority may not withdraw a specification if the court has finally terminated the proceedings thereon by a finding or a ruling which amounts to a finding of not guilty. In a joint case or in a case referred for a common trial, he may limit the direction to one or more of the accused.

b. ***Grounds for withdrawal.***—Proper grounds for the withdrawal of a specification include substantial defect in the specification, insufficiency of available evidence to prove the specification, and the fact that it is proposed to use one of the accused as a witness.

If evidence on the issue of guilt or innocence has been received after a plea has been entered, a withdrawal of a specification because of a failure of available evidence or witnesses, without any fault of the accused, amounts to jeopardy and constitutes a trial in the sense of Article 44. However, withdrawal of a specification because of manifest necessity in the interest of justice is not a bar to further prosecution. Thus, if urgent and unforeseen military necessity requires that a trial be terminated, and it does not appear that the military situation will permit resumption of the trial within a reasonable time, the withdrawal of a specification will not prevent a later trial for the same offense. Similarly, if inadmissible information, highly prejudicial to either the Government or the accused, has been brought to the attention of the court, and it appears to the convening authority that the members of the court cannot be reasonably expected to remain uninfluenced thereby, he may withdraw the case from that court and refer it to another court. The power to withdraw a case after evidence has been taken on the issue of guilt or innocence will be exercised only with the greatest caution, under urgent circumstances, and for very plain and obvious causes. A specification will not be withdrawn arbitrarily or unfairly to the accused in any case. When a specification is withdrawn after evidence has been taken on the issue of guilt or innocence, the reasons therefor should be stated in the record of trial.

c. ***Effect of withdrawal.***—A withdrawal of a specification during trial is not in itself equivalent to an acquittal or to a grant of pardon and is not as such a ground of objection or a defense in a subsequent trial. If the proceedings amounted to a trial in the sense of Article 44, the defense of former jeopardy should be asserted (68*d*). If a specification is withdrawn pursuant to a grant of immunity (148*e*, 150*b*), such grant of immunity may be asserted as a defense.

d. ***Withdrawal before arraignment.***—If a specification is withdrawn before the court convenes for the trial of a case, the trial counsel should line out and initial the withdrawn specification on the charge sheet and renumber the remaining specifications or charges when appropriate. When a specification is withdrawn after the court has convened, but before the arraignment of the accused, the withdrawal should be announced before the arraignment and the withdrawn specification should not be brought to the attention of the court. See 65*a*.

57. INTERLOCUTORY QUESTIONS OTHER THAN CHALLENGES.—*a.* ***Statutory provisions.***—The law officer of a general court-martial and the president of a special court-martial shall rule upon interlocutory questions other than challenges arising during the proceedings. Any such ruling made by the law officer of a general court-martial upon any interlocutory question other than a motion for a finding of not guilty or the question of accused's sanity shall be final and shall constitute the ruling of the court; but the law officer may change any ruling at any time during the trial (Art. 51*b*).

b. ***Applicability of this paragraph.***—This paragraph (57) applies to all interlocutory questions arising during the proceedings in open court (i. e., to all questions other than the findings and sentence) except the question of whether a challenge shall be sustained. Any statement or indication in this manual to the effect that a certain question should be decided by the court is not to be understood as making an exception to the foregoing rule. See, for example, 53, 54, 55, 58, and 137.

c. ***Rulings by the president of a special court-martial.***—The president of a special court-martial will rule in open court upon all interlocutory questions other than challenges arising during the trial, such as questions as to the admissibility of evidence offered during the trial, incompetency of witnesses, continuances, adjournments, recesses, motions, order of the introduction of witnesses, and the propriety of any argument or statement of the trial or defense counsel. If a member objects to a ruling of the president upon a question, the court shall be closed and the question voted on as stated in 57*f*.

d. ***Rulings by the law officer***.—(1) *General*.—A ruling by the law officer on an interlocutory question other than on a motion for a finding of not guilty or the question of the accused's sanity, being final so far as concerns the court, no repetition of the ruling is necessary. However, any question as to whether a ruling of the law officer is conclusive shall be determined by the law officer. Rulings by the law officer on a motion for a finding of not guilty (71*a*) and on the question of the sanity of an accused (122*b*) are final unless objected to by a member of the court. When proper objection is made to a ruling of the law officer on these two matters, he may give the court such instructions as will better enable the members to understand the question they are to determine and the manner in which it is to be determined. Thereafter the court will be closed and the question decided by a vote of the members of the court. The law officer shall not be present while the court is closed to deliberate or vote.

(2) *Treatment of proffered evidence*.—The law officer may examine a proffered item of real or documentary evidence before ruling upon its admissibility. He will take care that a proffered document (or, when practicable, an item of real evidence) is not exposed to risk of inadvertent examination by members of the court until he has ruled that the document (or item of real evidence) is admissible. In this connection, see 57*g* (2) for rules governing certain proceedings had outside the presence of the members of a general court-martial. The law officer should give the court appropriate instructions to disregard evidence which, once having been admitted, is excluded by a subsequent ruling.

e. ***Form of ruling***.—Each ruling by the president of a special court-martial and each ruling by the law officer which is subject to objection should be prefaced by a statement such as, "Subject to objection by any member."

f. ***Voting on interlocutory questions***.—When voting on any interlocutory question other than a challenge, the members of the court shall vote orally, beginning with the junior in rank, and the question shall be decided by a majority vote. A tie vote on a motion for a finding of not guilty or on a motion relating to the question of the accused's sanity shall be a determination against the accused. A tie vote on any other question (e. g., an objection by either side to the admissibility of certain evidence in a trial by special court-martial) shall be a determination in favor of the accused. See Articles 51*b* and 52*c*. The voting is in closed session, but the president announces the decision in open court. See 62*h* (3) for the manner of voting on challenges.

g. ***Necessary inquiry to be made; preponderance of evidence controls.***—(1) *General.*—The ruling or decision on an interlocutory question should be preceded by any necessary inquiry into the pertinent facts and law. For example, the party making the objection, motion, or request may be required to furnish evidence or legal authority in support of his contention. Upon such inquiry, questions of fact are determined by a preponderance of the evidence.

(2) *Law officer.*—The law officer is responsible for rulings made by him, but he may consult with the court in open session upon appropriate matters such as a continuance, adjournment, or recess before making his ruling. When necessary, he may recess the court for a time sufficient to enable him to consult pertinent legal authorities before making his ruling.

Except with respect to hearing arguments of counsel on proposed additional instructions (73*c* (2)), there is no requirement in courts-martial that the law officer conduct any hearings out of the presence of the members of the court. However, if it appears to the law officer that an offer of proof (154*c*), or preliminary evidence or argument with respect to the admissibility of proffered evidence, may contain matter prejudicial to the rights of the accused or the Government, he may, upon his own motion or upon motion of counsel, direct that the members of the court be excluded during the presentation of such offer of proof, preliminary evidence, or argument. Counsel for both sides, the accused, and the reporter will be present during such proceedings which, if they include the presentation of preliminary evidence, will be fully recorded, transcribed, and appended to the record of trial for the information of the convening authority. If such proceedings involve only arguments or offers of proof, they ordinarily will not be recorded but, in his discretion, the law officer may direct that such arguments or offers of proof, or pertinent parts thereof, be recorded, transcribed, and appended to the record of trial for the information of the convening authority. In this connection, however, see 154*c* for a limitation on the discretion of the law officer with respect to recording an offer of proof made by the defense.

When, as a result of a hearing held out of the presence of the members of the court, the law officer rules that proffered evidence is admissible, such evidence will be offered in open court subject to the rules of evidence; in addition, if preliminary evidence adduced at such a hearing goes to the weight of the evidence admitted by the ruling of the law officer, both sides will be given an opportunity to present for the consideration of the members of the court any competent evidence affecting the weight to be given to the evidence so admitted. In this connection, see 140*a* (Confessions and admissions).

In lieu of, or in addition to, any oral arguments of counsel with respect to the admissibility of evidence, the law officer may also direct counsel to submit written arguments or briefs on questions of law. Such written arguments or briefs need not be brought to the attention of the members of the court or made a part of the record of trial in the case. In his discretion, however, the law officer may direct that such written arguments or briefs, or pertinent parts thereof, be appended to the record of trial for the consideration of the convening authority.

(3) *President of a special court-martial.*—While the responsibility for a ruling devolves upon the president of a special court-martial, he may properly close the court and consult with the other members of the court before making his ruling.

58. CONTINUANCES.—*a.* ***General.***—A court-martial may, for reasonable cause, grant a continuance to any party for such time and as often as may appear to be just (Art. 40). There is no limit to the number of continuances which may be granted.

b. ***Postponement of trial.***—The necessity for a formal continuance may often be avoided by requesting the president to postpone the assembling of the court or by requesting the court to adjourn or to take a recess. As the law officer rules finally on any application for a continuance presented while the court is in session, the president of a general court-martial properly should obtain the advice of the law officer with respect to the request of a party for the postponement of the time for the assembling of the court.

c. ***Grounds for continuance.***—Among the grounds that may be considered as reasonable are the absence of a material witness; sickness of the trial counsel, accused, defense counsel, or a witness; insufficient time to prepare for trial; and a pending prosecution in a civil court based on the same act or omission.

A failure by the trial counsel to cause a copy of the charges to be served as required by Article 35 may be a ground for a continuance. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of the charges upon him, or before a special court-martial within a period of three days subsequent to the service of charges upon him (Art. 35).

*d. **Effect of denying application for continuance.***—The refusal by a court to grant a continuance when reasonable cause is shown will not ordinarily nullify the proceedings, but may be a good ground for directing a rehearing. The right to prepare for trial and to secure necessary witnesses is fundamental and must be extended to accused persons. Although the question of a continuance is one for the sound discretion of the court, whenever it appears that the court has abused its discretion and denied the accused a reasonable opportunity to prepare for trial or otherwise perfect his defense, the proceedings should be disapproved. A rehearing should be ordered only if the prejudice to the rights of the accused can be cured thereby.

*e. **Application and action thereon.***—Application should be made to the court if in session, otherwise to the convening authority, but an application to the court for an extended delay, if based on reasonable cause, may be referred by the court to the convening authority.

Although the proper time for making an application to the court is after the accused is arraigned and before he pleads, the court may permit it to be made at any other time.

*f. **Evidence in support of application.***—Reasonable cause for the application must be alleged. For instance, when a continuance is desired because of the absence of a witness, the application should show that the witness is material, that due diligence has been used to procure his testimony or attendance, that the party applying for the continuance has reasonable ground to believe that he will be able to procure such testimony or attendance within the period stated in the application, the facts which he expects to be able to prove by such witness, and that he cannot safely proceed with the trial without such witness.

In general the facts as set forth in the application may be accepted as substantially true; but if long or repeated delay is involved, or the facts are disputed or improbable, or if any other good reason therefor exists, the applicant may be required to furnish further proof. On any issue of law or fact arising in the proceedings on an application for a continuance, both parties will be given an opportunity to present evidence and to make an argument.

An application based on the absence of a witness may be denied when the opposite party is willing to stipulate that the absent witness would testify as stated in the application unless it clearly appears that such denial would be prejudicial.

Chapter XI

ORGANIZATION OF THE COURT AND ARRAIGNMENT OF THE ACCUSED

ASSEMBLING THE COURT—ATTENDANCE AND SECURITY OF ACCUSED—PRELIMINARY ORGANIZATION OF THE COURT—CHALLENGES—WITNESS FOR THE PROSECUTION—INVESTIGATING OFFICER—ARRAIGNMENT

59. ASSEMBLING THE COURT.—A general or special court-martial assembles at its first session in accordance with the order appointing it—thereafter according to adjournment. When, as is usually the case, the appointing order, after stating the hour and date of the first meeting, adds the words "or as soon thereafter as practicable"; or when, as is often the case, the court adjourns to meet at the call of the president, or whenever advisable or necessary for any reason, the president of the court, after conferring with the law officer in an appropriate case, will fix the hour and date for the first or subsequent meeting, as the case may be, and advise the trial counsel in order that proper notice of the meeting may be given to all concerned. See 58*b* (Postponement of trial).

A court-martial may hold sessions at any hour of the day, but should not meet at unusual hours, nor should the duration of the sittings be unusually protracted, unless the court is informed by the convening authority that the case is one of extraordinary urgency and that such a measure is therefore warranted.

60. ATTENDANCE AND SECURITY OF ACCUSED.—The convening authority, the ship or station commander, or other proper officer in whose custody or command the accused is at the time of trial is responsible for the attendance of the accused before the court. The accused will be properly attired in the class of dress or uniform prescribed by the president for the court. An accused officer, warrant officer, or enlisted person will wear the insignia of his rank or grade and may wear any decorations, emblems, or ribbons to which he is entitled.

The presence of the accused throughout the proceedings in open court is, unless otherwise stated, essential. See 11*c* (Effect of voluntary absence from trial) and 74*f* (1) (Form of the findings—General court-martial).

Neither the court nor the trial counsel as such is responsible for, or has any authority in connection with, the security of a prisoner being tried, and neither the court nor the trial counsel as such has any control over the imposition or nature of the arrest or other status of restraint of an accused. However, the court or the trial counsel may make recommendations to the proper authority as to these matters. The court does have control over the accused insofar as his personal freedom in its presence is concerned.

61. PRELIMINARY ORGANIZATION OF THE COURT.—*a.* ***Preconvening procedure.***—A court-martial should not be called to order for the trial of a new case until the law officer (president of a special court-martial), after examining the order appointing the court and making an informal inquiry of the personnel present, has determined that the accused and a quorum of the court are present for the trial of the case, and that the appointed members of the prosecution and defense present are apparently qualified, as prescribed by Article 27*b* or *c*, to conduct the prosecution and defense of the case. In determining the presence of a quorum of the court, the law officer or president should consider whether an enlisted accused has made a proper request for enlisted members; if so, at least one-third of the members present must be enlisted members unless the convening authority has determined that eligible enlisted persons are not available. In this connection, see 36*c* (2) and 41*d* (2).

b. ***Seating of personnel and the accused.***—When the court is ready to proceed, it is called to order by the president. The members will be seated with the president in the center and other members alternately to the right and left according to rank. If the rank of a member is changed, he will sit according to his new rank. The law officer will sit apart from the court. Depending upon the size and arrangement of the courtroom, other personnel and the accused will be seated as the president directs, except that the accused will be permitted to sit with his counsel. See appendix 8 for suggested seating arrangements for general and special courts-martial.

c. ***Announcing personnel of the court and the accused.***—After the court is called to order for the trial of a new case, the trial counsel will announce the name of the accused and will state by what appointing order (including any amendment thereof) the court is convened. He will then announce the names of the law officer, the members, and counsel who are present, and the names of members and counsel who are absent. Similar announcement will be made whenever there is a change in the law officer, the members, or counsel present, either through the appearance of new personnel or personnel previously absent, or through the absence of personnel previously present. When the court assembles after an adjournment or recess, or after it has been closed for any reason, the trial counsel will state in open court whether all parties to the trial who were present at the time of the adjournment or recess, or at the time the court closed, are present.

d. ***Swearing reporter and interpreter.***—After accounting for the personnel, the trial counsel will swear the reporter and interpreter, if any. See 114 for oath. A new reporter or interpreter appointed during the course of a trial will be sworn before entering upon his duties.

e. ***Introduction of prosecution counsel.***—The trial counsel will next announce whether the legal qualifications of the members of the prosecution are other than as stated in the appointing order and whether any member of the prosecution has acted as investigating officer (64), law officer, court member, or member of the defense in the same case, or has acted as counsel for the accused at a pretrial investigation or other proceedings involving the same general matter (6*a*; Art. 27). If it appears that the trial counsel or any of his assistants may be disqualified by reason of prior participation in the case, the court will initiate an inquiry to determine whether the individual concerned is, in fact, disqualified and, if so, whether he has acted for the prosecution (6*a*, *d*). When it appears that a member of the prosecution is disqualified by reason of prior participation and that he has acted as a member of the prosecution in the case before the court, the court should adjourn and report the facts to the convening authority. If the disqualified member has not acted for the prosecution, the proceedings may continue, but the disqualified member will not be permitted to act for the prosecution during any future stage of the proceedings and he will be excused forthwith. When, as a result of excusing a disqualified member of the prosecution, no qualified trial counsel or assistant trial counsel remains, the court should adjourn and report the facts to the convening authority.

Any change in prosecution counsel during the trial and the qualifications of any new counsel should be brought to the attention of the court in the manner prescribed in the preceding subparagraph.

f. ***Introduction of defense counsel.***—(1) *General rules as to legal qualifications.*—A general court-martial is not legally constituted unless the appointed defense counsel has been certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member (Art. 27*b*). Similarly, a special court-martial is not legally constituted unless the following jurisdictional requirements with respect to the legal qualifications of appointed defense counsel are satisfied:

(*a*) If the appointed trial counsel is qualified to act as counsel before a general court-martial, the appointed defense counsel shall be a person similarly qualified (Art. 27*c* (1)); or (*b*) If the appointed trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or the highest court of a State, the appointed defense counsel shall be one of the foregoing (Art. 27*c* (2)).

In addition to the foregoing requirements, which are jurisdictional, it is a purpose of Articles 27 and 38 that an accused person shall, if he desires, be represented at his trial by general or special court-martial by a counsel having legal qualifications equivalent to those of any member of the prosecution who has legal qualifications. For example, in a trial by special court-martial, if an assistant trial counsel is qualified to act as counsel of a general court-martial or has any of the legal qualifications enumerated in Article 27*c* (2), the accused should be advised that he is entitled to be represented by counsel having equivalent qualifications, even though the appointed trial counsel has no legal qualifications; similarly, in a trial by general court-martial, should the accused be represented by counsel of his own selection who is not qualified to act as counsel before a general court-martial, the accused should be advised that he is entitled to be represented by counsel who is qualified to act as counsel before a general court-martial.

(2) *Ascertaining legal qualifications of counsel for the defense.*—After the court has ascertained the qualifications of the members of the prosecution, the trial counsel will ask the accused whom he desires to introduce as counsel. Counsel representing the accused will then be asked to state whether the legal qualifications of the appointed members of the defense are other than as stated in the order appointing the court.

Should the accused introduce counsel of his own selection, and the qualifications of such counsel are not shown in the order appointing the court, his selected counsel will be asked to state whether he has been certified by an appropriate Judge Advocate General as competent to act as counsel before a general court-martial, and, if not, whether he has any of the legal qualifications enumerated in Article 27*b* (1).

(3) *Action when defense counsel is not legally qualified.*—If the appointed defense counsel of a general court-martial has not been certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member (Art. 27*b*), the court will adjourn and report the matter to the convening authority. Similar action will be taken by a special court-martial when it appears:

(*a*) That the appointed trial counsel is qualified to act as counsel before a general court-martial, but the appointed defense counsel is not so qualified (Art. 27*c* (1)); or (*b*) That the appointed trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or the highest court of a State, but the appointed defense counsel is not one of the foregoing (Art. 27*c* (2)).

If the foregoing jurisdictional requirements have been met, but no member of counsel for defense present, including the individual counsel, has legal qualifications equivalent to those of any member of the prosecution who is legally qualified, the law officer (president of a special court-martial) will advise the accused of his right to such counsel and will ask him whether he is willing to proceed to trial without counsel so qualified. If the accused expressly requests that he be represented by the defense counsel then present, including individual counsel, if any, and states that he does not wish the services of a counsel who has the requisite equivalent legal qualifications, the trial will proceed. If not, the court will adjourn pending procurement of a defense counsel who has the requisite qualifications. Regardless of the legal qualifications of individual counsel, the duly appointed defense counsel and assistant defense counsel shall, if the accused so desires, act as his associate counsel; otherwise they shall be excused by the president of the court (Art. 38*b*).

(4) *Prior participation of defense counsel in same case.*—After the court has determined that the defense counsel has the requisite legal qualifications, the trial counsel will ask the counsel representing the accused to state whether any member of the defense present, including individual counsel, is the accuser or has acted in the same case as a member of the prosecution (6*a*, *d*), or as investigating officer (64), law officer, or court member. If it appears that any member of the defense has previously acted in the same case for the prosecution, such member will be excused forthwith. If a member of the defense is the accuser or has participated in the same case as an investigating officer, law officer, or court member, he will be excused unless the accused expressly requests his services. If, as a result of excusing a member of the defense, the accused is left without counsel having the requisite legal qualifications, the court will adjourn and report the matter to the convening authority.

(5) *Change of defense counsel during trial.*—Any change in defense counsel during the trial and the qualifications of any new counsel should be brought to the attention of the court and the accused in the manner prescribed in this subparagraph (61*f*).

g. ***Announcement of request for enlisted members.***—When the court has ascertained that counsel representing the prosecution and defense are qualified to perform their respective duties, the law officer (president of a special court-martial) will so state. Thereupon, the trial counsel will, in the case of an enlisted accused, announce whether the accused has made a request in writing that the membership of the court include enlisted persons. See appendix 8. If a written request, signed by an enlisted accused, is not made prior to or at this time, the accused may not thereafter assert his right to have enlisted members on the court. If a proper request for enlisted members is made prior to or at this time, the trial may not proceed unless at least one-third of the members actually sitting on the court are enlisted persons or unless the convening authority has directed that the trial proceed in the absence of enlisted members. See 4*a* and *c*. When one or more, but not all, of the accused being tried at a joint or common trial make a proper request for enlisted members, the court will take action similar to that prescribed when a motion to sever has been granted. In this connection, see 69*d*.

h. ***Administration of oaths.***—The accused, a quorum of the court, properly qualified counsel, and, in a general court-martial, the law officer, being present, the members of the court and the law officer will be sworn by the trial counsel; thereafter, the president of the court will swear the members of the prosecution and the defense, including any individual counsel (civilian or military). All personnel, including the law officer, counsel, the accused, the reporter, and the interpreter, if any, will stand while the oaths are being administered. See 114 as to oaths.

i. ***Convening of court.***—After the oaths have been administered, the convening of the court is complete.

62. CHALLENGES.—*a*. ***Statutory provisions.***—Members of a general or special court-martial and the law officer of a general court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The court shall determine the validity of challenges for cause, and shall not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered. Each accused and the trial counsel shall be entitled to one peremptory challenge, but the law officer shall not be challenged except for cause (Art. 41).

b. ***Disclosing grounds for challenges.***—After the members of the court, the law officer, and counsel have been sworn, the trial counsel will announce to the court the general nature of the charges, the name of the accuser, the investigating officer, the officer or officers forwarding the charges to the convening authority, and the name of any court member or law officer who participated in any proceedings already had. He will then disclose in open court every ground for challenge believed by him to exist in the case and will request that the law officer and each member do likewise with respect to grounds of challenge, whether against the law officer or member himself or against any others who are subject to challenge for cause. Among the grounds for challenge which a member or the law officer should disclose are these: That he has participated in the investigation of the case, has acted as counsel for the accused, will be a witness for the prosecution, or has forwarded the charges to the convening authority with a recommendation concerning trial by court-martial.

Similar disclosures and requests will be made by the trial counsel with respect to a new member or law officer; and the trial counsel, any member, or the law officer will disclose any such ground at any time during the proceedings that he becomes aware of it.

Without challenging a member for cause, the trial or defense counsel may question the court, or individual members thereof, concerning the existence or nonexistence of facts which may disclose a proper ground of challenge for cause. Thus the trial counsel, after advising the court that an offense charged against the accused is punishable by death, might ask, "Does any member of the court have any conscientious scruples against imposing the death penalty in a proper case?" If he desires, the trial counsel might ask individual members to answer such a question. Similarly, the defense counsel might question the court, or individual members thereof, with respect to whether they know the accused and, if so, whether they are hostile or friendly toward him. It is optional with the questioning party whether the member being questioned shall be sworn to testify as to his competency before answering such preliminary questions.

c. ***Action upon disclosure.***—If it appears from any disclosure that the law officer or a member is subject to challenge on any ground stated in clauses (1) to (8) of 62*f*, and the fact is not disputed, the law officer or member will be excused forthwith. If the law officer is excused or the court is reduced below a quorum, the court will adjourn pending appointment of a new law officer or additional members. Except as just stated, no action is required under this paragraph (62*c*) with respect to any disclosure that may be made; but proceedings under this paragraph are without prejudice to any rights of challenge on either side.

d. ***When made; reconsideration; opportunity to challenge new member.***—Challenges should be made before arraignment, but the court may permit a challenge for cause to be presented at any stage of the proceedings. A challenge will be so permitted if the challenger has exercised due diligence or if the challenge is based on any of the grounds stated in clauses (1) to (8) of 62*f*.

The fact that a particular challenge for cause has been adversely determined does not preclude the court from again entertaining it if good cause, such as newly discovered evidence, is shown. Full and timely opportunity will be given to challenge every new member or law officer.

e. ***Peremptory challenges.***—A peremptory challenge does not require any reason or ground therefor to exist or to be stated. It may be used before, during, or after challenges for cause, or against a member unsuccessfully challenged for cause, or against a new member if not previously utilized in the trial. It cannot be used against the law officer. A member challenged peremptorily will be excused forthwith.

In a joint or common trial each accused is entitled to one peremptory challenge.

f. ***Challenges for cause—grounds for.***—Among the grounds of challenges for cause against members of special and general courts-martial and (unless otherwise indicated by the context) the law officer of a general court-martial are the following:

(1) That the challenged law officer or member is not eligible to serve as law officer or member, respectively, on courts-martial.

(2) That he is not a member or law officer of the court.

(3) That he is the accuser as to any offense charged. See Article 1 (11) for definition of accuser.

(4) That he will be a witness for the prosecution. See 63 for definition of witness for the prosecution.

(5) That he was the investigating officer as to any offense charged. See 64 for definition of investigating officer.

(6) That he has acted as counsel for the prosecution or the accused as to any offense charged.

(7) That (upon a rehearing or a new trial) he was a member of the court which first heard the case.

(8) That he is an enlisted member who is assigned to the same unit as the accused. See 4*a* and Article 25*c* (2) for definitions of the word "unit".

(9) That he has forwarded the charges in the case with his personal recommendation concerning trial by court-martial.

(10) That he has formed or expressed a positive and definite opinion as to the guilt or innocence of the accused as to any offense charged.

(11) That he has acted in the same case as the convening authority or as the legal officer or staff judge advocate to the convening authority.

(12) That he will act in the same case as the reviewing authority (84) or as the legal officer or staff judge advocate to the reviewing authority (85*a*).

(13) Any other facts indicating that he should not sit as a member or law officer in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality. Examples of other facts constituting grounds for challenge are: That (upon a rehearing or new trial) he was the law officer of the court which first heard the case; that he will be a witness for the defense; that he testified or submitted a written statement in connection with the investigation of the charges (unless at the request of the accused); that he has officially expressed an opinion as to the mental condition of the accused; that, when it can be avoided, a member is junior in rank or grade to the accused; that he has a direct personal interest in the result of the trial; that he is in any way closely related to the accused; that he participated in the trial of a closely related case; that he is decidedly hostile or friendly to the accused; that (in a case involving an offense punishable by death) a member has conscientious scruples against imposing the death penalty; that, not having been present as a member when testimony on the merits was heard, or other important proceedings were had in the case, his sitting as a member will involve an appreciable risk of injury to the substantial rights of an accused, which risk will not be avoided by a reading of the record. In connection with this last example, see 41*e* and *f*, and 62*h* (1).

g. ***Limitations on inquiry as to eligibility of law officer.***—A challenge against a law officer based on the ground that he is not eligible to act as law officer (62*f* (1)) will not be sustained unless it is shown: (1) That he is not an officer; or (2) that he is not on active duty with an armed force; or (3) that he is not a member of the bar of a Federal court or of the highest court of a State of the United States; or (4) that he has not been certified to be qualified for duty as a law officer by the Judge Advocate General of the armed force of which he is a member. The hearing on such a challenge will be limited to the issue of determining whether any one of the four reasons enumerated above exists. In this connection the appointment of an officer as law officer of a general court-martial is prima facie evidence that he is an officer on active duty with an armed force; the recital of his legal qualifications in the appointing order is prima facie evidence of the facts recited therein. An inquiry into the general educational, legal, or judicial experience of the law officer is improper.

h. **Procedure.**—(1) *Manner of making challenges.*—After any challenges made by the trial counsel have been decided, he will, after complying with any request made by the accused to be permitted to examine the papers referred to in 44*h*, give the accused an opportunity to exercise his rights as to challenge. The accused thereupon may challenge, in turn, the law officer and each member to whom he objects. As to peremptory challenges, see 62*e*. Full and timely opportunity will be given to the accused, including each accused in a joint or common trial, to exercise his right of challenge. A challenge may be withdrawn by the challenger for any reason, as when the challenged member makes a statement or reply which is satisfactory to the challenger. A challenge on the ground that a member was absent when testimony on the merits or other important proceedings was had will often be withdrawn by the challenger upon his being informed that certain witnesses will be recalled and re-examined.

(2) *Inquiry.*—If a member or law officer is challenged for any of the first eight grounds enumerated in 62*f*, and he admits the fact upon which the challenge is based, or if in any case it is manifest that a challenge will be unanimously sustained, the member or law officer will be excused forthwith unless objection or question is made or raised; otherwise the challenge, if not withdrawn, must be passed on by the court after both sides have been given an opportunity to introduce evidence and to make an argument. The challenger may subject the challenged member or law officer to an examination under oath as to the subject matter of the challenge. For form of the oath, see 114. Ordinarily, the person against whom a challenge for cause has been made will take no part in the hearings upon such challenge except when called upon to testify or to make a statement as to his competency; however, the law officer (president of a special court-martial) shall continue to rule upon interlocutory questions arising during the hearing although the challenge was made against him and although he may, at the time such a question arises, be testifying under oath as to his competency. In the latter event, he should preface any ruling by a statement such as, "As law officer (president) I rule that . . ."

Courts should be liberal in passing upon challenges, but need not sustain a challenge upon the mere assertion of the challenger. The burden of maintaining a challenge rests on the challenging party. A failure to sustain a challenge when good ground is shown may require a disapproval on jurisdictional grounds or cause a rehearing because of error injuriously affecting the substantial rights of an accused.

(3) *Deliberation and voting.*—Deliberation and voting upon a challenge will be in closed session, and the law officer and the challenged member, if any, will be excluded. The vote upon the challenge is by secret written ballot, which ballot may be in the form "Sustained" or "Not sustained." See Article 51*a* as to counting and checking the vote and announcing the result of the ballot. Deliberation on the challenge may properly include full and free discussion. The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of members in the exercise of their judgment. A majority of the ballots cast by the members present at the time the vote is taken shall decide the question of sustaining or not sustaining the challenge. A tie vote on a challenge disqualifies the member challenged (Art. 52*c*). Upon the court being opened the president shall state in open court that the challenge has been sustained or not sustained. When five members of a general court-martial (three in a special court-martial) are present and one is challenged, the remaining four (two) may vote on the challenge.

(4) *Action.*—If the challenge is sustained, the challenged member or law officer will withdraw from the court; otherwise he will resume his seat. The court will then proceed to consider the next challenge, if one be presented. When a court has been reduced below a quorum, or when the number of enlisted persons on a court is reduced below one-third in a case in which the accused has requested enlisted members, or when a challenge of the law officer for cause is sustained, the court will adjourn and report the matter to the convening authority.

63. WITNESS FOR THE PROSECUTION.—If at any stage of the proceedings the law officer or any member of the court is called as a witness by the prosecution, he shall, before qualifying as a witness, be excused from further duty as law officer or member, respectively, in the case. Whether the law officer or a member called as a witness for the court is to be considered as a witness for the prosecution depends on the character of his testimony. In case of doubt he will be excused as law officer or member, respectively. If a witness called by the defense testifies adversely to the defense, he does not thereby become a "witness for the prosecution."

64. INVESTIGATING OFFICER.—Within the meaning of the fifth clause of 62*f* and Articles 25*d* (2), 26*a*, and 27*a*, the term "investigating officer," as applied to a particular offense, shall be understood to include a person who, under the provisions of 34 and Article 32, has investigated that offense or a closely related offense alleged to have been committed by the accused. The term also includes any other person who, as counsel for, or a member of, a court of inquiry, or as an investigating officer or otherwise, has conducted a personal investigation of a general matter involving the particular offense; however, it does not include a person who, in the performance of his duties as counsel, has conducted an investigation of a particular offense or a closely related offense with a view to prosecuting or defending it before a court-martial. But see 6*a* and 62*f*(6).

65. ARRAIGNMENT.—*a.* ***General.***—The court being organized and both parties ready to proceed, the trial counsel will present the law officer and the members of the court with copies of the charges and specifications upon which the accused is about to be tried. See 56*d* in this connection. He will then read to the accused the charges and specifications, and will call upon each of the accused to plead thereto. This proceeding constitutes the arraignment. The pleas are not part of the arraignment. The fact that the service of the charges was within five days of the arraignment before a general court-martial (three days in a case before a special court-martial) does not prevent the arraignment, even though the accused objects on that ground to the proceedings, but such fact is available, in time of peace, as a ground of valid objection to any further proceedings in the case at that time (Art. 35).

The accused may waive the reading of the charges and specifications.

As a rule, after arraignment in a case involving several charges and specifications, the procedure to be followed will be to receive pleas according to numerical order on the specifications of the first charge, then on the first charge, and so on with the rest. When appropriate, a single plea may be entered as to all charges and specifications without enumerating them.

b. ***Additional charges.***—After the accused has been arraigned upon certain charges, additional charges, which the accused has had no notice to defend and regarding which the right to challenge has not been accorded him, cannot be introduced, nor may the accused be required to plead thereto. However, if all the usual proceedings prior to arraignment are first had with respect to such additional charges, including proceedings as to qualifying counsel and excusing and challenging the law officer and members of the court, such charges may be introduced, the accused may be arraigned on them, and the trial may proceed on both sets of charges as the trial of one case. It is not necessary that any official or clerical assistant of the court be resworn when additional charges are introduced. An application for a reasonable continuance should be granted.

Chapter XII

PLEAS AND MOTIONS

GENERAL—MOTIONS RAISING DEFENSES AND OBJECTIONS—MOTIONS TO DISMISS—MOTIONS TO GRANT APPROPRIATE RELIEF—PLEAS—MOTIONS PREDICATED UPON THE EVIDENCE

66. GENERAL.—For matters dealing with the arraignment, see 65. Pleas in court-martial procedure are pleas of guilty, not guilty, and pleas corresponding to permissible findings (70, 74*b*). Defenses and objections raised before a plea is entered shall be raised only by motion to dismiss or to grant appropriate relief as provided in this chapter.

Pleas are entered and, except as otherwise stated, motions raising defenses and objections are made after arraignment.

67. MOTIONS RAISING DEFENSES AND OBJECTIONS.—*a.* ***Defenses and objections which may be raised.***—Any defense or objection which is capable of determination without trial of the issue raised by a plea of not guilty may be raised before trial by reference to the convening authority, or by motion to the court before a plea is entered. Reference of such matters to the convening authority before trial is an administrative procedure and action thereon shall be without prejudice to the renewal of the assertion by motion to the court.

Defenses and objections such as that trial is barred by the statute of limitations, former jeopardy, pardon, constructive condonation of desertion, former punishment, promised immunity, lack of jurisdiction, and failure of the charges to allege an offense should ordinarily be asserted by motion to dismiss before a plea is entered; but failure to assert them at that time does not constitute a waiver of the defense or objection. Unless otherwise stated, failure to assert any such defense or objection—except lack of jurisdiction or failure of the charges to allege an offense—before the conclusion of the hearing of the case constitutes a waiver.

b. ***Defenses and objections which must be raised.***—Defenses and objections based on defects in the preferring of charges, reference for trial, form of the charges and specifications, investigation, or other pretrial proceedings other than objections going to the jurisdiction of the court or the failure of the charges to allege an offense may be raised only by a motion for appropriate relief before a plea is entered. Failure to present any such objection prior to plea constitutes a waiver thereof, but the court for good cause shown may grant relief from the waiver.

c. ***Form and content of motion.***—The motion raising a defense or objection should include all such defenses and objections then available and known to the accused. Defenses and objections which may appear to be available to the accused shall, if not asserted, be brought to the attention of the accused in any case in which he is not represented by counsel and may be brought to his attention in any case.

The motion should briefly and clearly set forth the nature and grounds of the defense or objection which it is intended to raise. It may be presented orally or in writing. The substance of the motion and not its form or designation will control; for instance, if an accused makes a motion which he calls a motion for appropriate relief, but which in fact raises an objection to trial on jurisdictional grounds, the motion will be treated as a motion to dismiss.

d. ***Time of making motions.***—A motion raising any of the defenses and objections discussed in *a* and *b* above should be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

Certain other motions predicated upon issues raised by the evidence in the case, such as motions for a finding of not guilty and motions to dismiss the proceedings on the grounds of *res judicata*, should generally be made after the prosecution has rested its case or at the conclusion of all the evidence. A motion to inquire into the mental condition of the accused (122) or to dismiss the proceedings on the ground that the accused lacks the requisite mental capacity (120*c*) may be raised at any time during the trial.

e. ***Hearing on the motion.***—A motion raising a defense or objection will be determined at the time it is made unless the court defers action on the motion until a later time. Before passing on a contested motion, the court will give each side an opportunity to introduce pertinent evidence and to make an argument. Except as otherwise indicated in the discussion of motions (68*c*, Statute of limitations) and elsewhere (122*a*, Insanity), the burden rests on the accused to support by a preponderance of evidence a motion raising a defense or objection. A decision on such a motion is an interlocutory matter.

If the motion raises a contested issue of fact which should properly be considered by the court in connection with its determination of the accused's guilt or innocence, the introduction of evidence thereon may be deferred until evidence on the general issue is received. For example, if a specification alleges that an offense was committed at a time which is within the period permitted by the statute of limitations and the accused makes a motion to dismiss on the ground that trial is barred by Article 43, asserting that the offense was committed at an earlier time than that alleged, the introduction of evidence pertinent to the motion may be deferred and the matter considered by the court in its deliberation on the issue of guilt or innocence. See also 122*b* for a discussion of the question of the mental responsibility of the accused in connection with the findings on the general issue.

f. ***Effect of rulings on motion.***—The denial of a motion raising a defense or objection does not prevent the entering of another motion to the same specification or charge. The court may reconsider its action in denying or sustaining a motion as long as the case is before the court.

Except as otherwise indicated in the discussion on motions, an accused will not be required to plead to a specification or charge so long as the action of the court in sustaining a motion to dismiss or for appropriate relief relating to the specification or charge stands; but when all such motions as to a given charge or specification are denied, the accused should enter a plea or, if he stands mute, a plea of not guilty should be entered for him by the court.

Notwithstanding the action of the court on a motion raising a defense or objection, the trial may proceed in the usual course as long as one or more specifications and charges remain as to which a plea stands. For example, when a motion to dismiss is sustained as to all but one specification and charge to which the plea is not guilty, the trial on that specification and charge may continue. But when the trial cannot proceed further as the result of the action of the court on a motion raising a defense or objection, the court will adjourn and submit the record of its proceedings so far as had to the convening authority.

The convening authority may not return to the court for reconsideration a ruling of the court which amounts to a finding of not guilty, such as the granting of a motion to dismiss because of lack of mental responsibility at the time of the offense (120*b*), or the granting of a motion for a finding of not guilty (71*a*; Art. 62). As to motions granted by the court which do not amount to a finding of not guilty, the convening authority may, if he disagrees, return the record of trial to the court with a statement of his reasons for disagreeing and with instructions to reconvene and reconsider its ruling with respect to the matters as to which he is not in accord with the court (Art. 62*a*). To the extent that the court and the convening authority differ as to a question which is solely one of law, such as whether the charges allege an offense cognizable by a court-martial, the court will accede to the views of the convening authority; but if the matters as to which the convening authority disagrees are issues of fact, such as those which may be presented on an objection to trial on the ground that the accused lacks the requisite mental capacity at the time of trial (120*c*), the court will exercise its sound discretion in reconsidering the motion. The order returning the record should include an appropriate direction with respect to proceeding with the trial or any further appropriate action (Art. 62*a*). If the convening authority finds that the action of the court was proper but that the defect raised by the motion can be cured, he will take appropriate action to remedy the defect and return the record to the court for trial as above indicated. If he does not wish to return the record for trial, he will take appropriate action to conclude the case by the publication of appropriate orders in cases wherein the action of the court operates as a bar to further prosecution. Generally such action should be taken if the proceedings are terminated by sustaining a motion to dismiss because of former jeopardy, pardon, constructive condonation of desertion, promised immunity, or when findings of not guilty are entered on motion. In other cases, he will take action appropriate under the circumstances.

g. ***Inadmissible defenses and objections.***—Such objections as that the accused, at the time of the arraignment, is undergoing a sentence of a general court-martial, or that owing to the long delay in bringing him to trial he is unable to disprove the charge or to defend himself, or that his accuser was actuated by malice or is a person of bad character, or that he was released from restraint upon the charges are not proper subjects for motion prior to plea, however much they may constitute ground for a continuance or affect the questions of the truth or falsity of the charge or of the measure of punishment. The same is true in general as to objections that are solely matters of defense under a plea of not guilty and, in effect, merely contest the truth of the allegations of a charge.

68. MOTIONS TO DISMISS—*a.* ***General.***—A motion to dismiss properly relates to any defense or objection raised in bar of trial. Among the defenses and objections which may be raised by this motion prior to entering a plea are lack of jurisdiction (68*b*), failure of the charges to allege an offense (68*b*), running of the statute of limitations (68*c*), former jeopardy (68*d*), pardon (68*e*), constructive condonation of desertion (68*f*), former punishment (68*g*), and promised immunity (68*h*).

b. ***Lack of jurisdiction; failure to allege an offense.***—(1) *General.*—If the court lacks jurisdiction or if the charges fail to allege any offense under the code the proceedings are a nullity. These objections cannot be waived and may be asserted at any time.

(2) *Jurisdiction of the court over the person.*—A motion to dismiss on the ground of lack of jurisdiction over the person may be based on the absence of any of the requisites stated in 8.

(3) *Failure to allege an offense.*—By a motion to dismiss the accused may object to the sufficiency of a specification to allege any crime or offense. With the exceptions stated in 14*a*, courts-martial do not have jurisdiction to try any offenses not cognizable under the code. Unless the specification of a charge alleges an offense of which a court-martial may take cognizance, a motion to dismiss should be granted as to the specification. If the motion is sustained the court will direct that the specification be stricken and disregarded.

c. ***Statute of limitations.***—For all but a few crimes or offenses, exemption from liability to be tried by a court-martial or punishment under Article 15 may, with certain limitations, be claimed after two (or three) years. See Article 43 in appendix 2. In the case of any offense the trial of which in time of war is certified to the President by the Secretary of a Department to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed for the trial of the offense shall be extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress (Art. 43*e*). When the United States is at war, the running of any statute of limitations applicable to certain other offenses under the code shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress. See Article 43*f*.

If, prior to 31 May 1951, the trial or punishment of any crime or offense has been barred by the running of the statute of limitations under the law in effect prior to that date, Article 43 of the code shall not be construed as reviving liability to trial or punishment for such crime or offense. However, if the statute of limitations has not run prior to 31 May 1951, the running of the statute of limitations shall be governed by the provisions of Article 43 of the code.

The period of limitation begins to run on the date of the commission of the offense. With respect to liability to trial by court-martial, it ends when sworn charges and specifications are received by any officer exercising summary court-martial jurisdiction over the command which includes the accused. See 33*b* and Article 24. The termination of the period of limitation may be proved, prima facie, by the signed receipt for the charges and specifications prescribed in 33*b*. With respect to liability to non-judicial punishment, the period of limitations ends with the imposition of punishment under Article 15 (Art. 43*c*). Certain offenses, as, for example, wrongful cohabitation, are continuing offenses, and the accused cannot avail himself of the statute of limitations for any part of continuing offenses not within the bar of the statute of limitations. Absence without leave (Art. 86), desertion (Art. 85), and fraudulent enlistment (Art. 83 (1)) are not continuing offenses and are committed, respectively, on the date the person so absents himself, deserts, or first receives pay or allowances under the enlistment. If it appears that the statute of limitations bars trial of an alleged desertion or absence without leave the court may not find by exceptions and substitutions that such desertion or unauthorized absence began at a later time not barred by the statute. However, in cases in which the statute of limitations is not involved, the court may find by exceptions and substitutions that a desertion or unauthorized absence began at a later time than that alleged (but within the period alleged), but such finding by exceptions and substitutions may not increase the amount of punishment that might be adjudged. As to amending charges when appropriate, see 33*d*.

In applying this statute the court will be guided by the crime or offense as described in the specification, and not by the article stated in the charge. Thus, if an offense properly chargeable under Article 121 is erroneously charged under Article 134, the limitation is nevertheless three years rather than two years.

If it appears from the charges that the statute has run against an offense or (in the case of a continuing offense) a part of the offense charged, the court will bring the matter to the attention of the accused and advise him of his right to assert the statute unless it otherwise affirmatively appears that the accused is aware of his rights in the premises. See 53*h*. This action should, as a rule, be taken at the time of arraignment. If the accused pleads guilty to a lesser included offense against which the statute of limitations has apparently run, the court will advise the accused of his right to interpose the statute in bar of trial and punishment as to that offense. See also 74*h*.

The burden is not on the defense to show that neither absence from the territory in which the United States has authority to apprehend him nor other impediment prevents the accused from claiming exemption under Article 43. For example, if it appears from the charges in a peacetime desertion case that more than three years have elapsed between the date of the commission of the offense and the date when sworn charges and specifications were received by an officer exercising summary court-martial jurisdiction over the command which includes the accused, the motion should be sustained unless the prosecution shows by a preponderance of evidence that the statute does not apply because of periods which, under the provisions of Article 43*d*, are to be excluded in computing the three years.

Since the statute of limitations is a matter of defense, it may be waived by the accused provided he is aware of his right to assert it. A plea of guilty, after explanation of its effect with respect to the statute of limitations, operates as such waiver. If an accused pleads guilty to a lesser included offense against which the statute of limitations has run and persists in the plea after the meaning and effect thereof have been explained to him including his right to interpose the statute of limitations as to the lesser included offense, the plea of guilty, as long as it stands, is a waiver of his right to interpose the statute of limitations in bar of punishment. Under these circumstances he may not, after a finding of guilty of such lesser included offense, assert the statute in bar of punishment. It is not imperative that the accused, in order to avail himself of this defense, do so by means of a motion to dismiss. The limitation may equally be taken advantage of under a plea of not guilty by establishing the defense by evidence during the trial. See 67*e* for an example of a case in which it is appropriate to raise this defense under a plea of not guilty. In such a case, however, the accused must advise the court that he is insisting upon the defense of the statute of limitations under his plea of not guilty, since failure to assert the defense during the hearing constitutes a waiver (67*a*).

d. ***Former jeopardy.***—No person shall be tried a second time for the same offense without his consent (Art. 44*a*). No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall, as to such charge or specification, be held to be a trial in the sense of Article 44 until the finding of guilty has become final after review of the case has been fully completed (Art. 44*b*). But the disapproval or setting aside of a finding of guilty as to any charge or specification for lack of sufficient evidence in the record to support the findings of guilty is a bar to rehearing upon that charge or specification (Arts. 63*a*, 66*d*, 67*e*).

If, subsequent to the introduction of any evidence on the general issue (the issue of guilt or innocence raised by a plea), a proceeding is dismissed or terminated by the convening authority or on motion of the prosecution because of failure of available evidence or witnesses without any fault of the accused, such proceeding shall be a trial in the sense of Article 44 (Art. 44*c*). The word "terminated" as herein used means a final conclusion of the hearing, and not a mere continuance for the purpose of obtaining additional evidence or for any other purpose. Except as provided in Article 44*c*, a proceeding is not a trial in the sense of Article 44 if, because of manifest necessity in the interest of justice, it was terminated before findings (56*b*).

A person has not been tried in the sense of Article 44 if the proceedings were void for any reason, such as lack of jurisdiction to try the person or the offense.

The same acts constituting a crime against the United States cannot, after acquittal or conviction of the accused in a civil or military court deriving its authority from the United States, be made the basis of a second trial of the accused for that crime in the same or in another such court without his consent. The civil courts in the Territories and possessions of the United States, as well as the district and other courts of the United States, derive their authority from the United States. The same acts when committed in a State may constitute two distinct offenses, one against the United States and the other against the State. In such a case trial by a State court does not bar trial by court-martial.

In general, once a person is tried for an offense in the sense of Article 44, he cannot without his consent be tried for an offense necessarily included therein. When once tried for a lesser offense, an accused cannot be tried for a major offense which differs from the lesser offense in degree only. Thus a trial for manslaughter may be interposed in bar of trial for the same homicide subsequently charged as murder because both offenses involve the same unlawful killing and are distinguished from each other only by the state of mind of the accused. On the other hand, a trial for a homicide is not barred by a former trial for an assault and battery. See 71*b*, however, for an example of a case when the defense of *res judicata* may be asserted after acquittal of a lesser included offense. A trial for absence without leave (Art. 86) bars trial for the same absence charged as desertion and vice versa if the same enlistment is involved in both cases, since both offenses involve the same unauthorized absence. But when a person in the military service deserts and re-enlists, trial for absence without leave from the second enlistment does not bar trial for desertion from the first enlistment although the same period of time may in part be involved in both cases.

Subject to the rules as to documentary evidence, including the rules as to the use of copies, former jeopardy by court-martial may be proved in appropriate cases by the order publishing the result of trial. Former jeopardy by civil court may be proved by the indictment and record of conviction or acquittal. When necessary or desirable former jeopardy by any court may be proved by the record of trial by court-martial or civil court.

e. ***Pardon.***—A pardon is an act of the President which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. A pardon may be interposed in bar of trial by a motion to dismiss. The usual rules as to documentary evidence apply to a written pardon, whether in the nature of an individual pardon or of a general amnesty. If the document is not sufficiently explicit to determine whether the motion should be sustained, the defense may introduce other evidence tending to establish the pardon.

f. ***Constructive condonation of desertion.***—If an officer exercising general court-martial jurisdiction unconditionally restores a deserter to duty without trial with knowledge of the alleged desertion, this action amounts to a constructive condonation of the desertion and may be interposed in bar of trial subsequently ordered. If an officer exercising general court-martial jurisdiction shall have directed that a deserter be restored to duty but that he remain subject to trial for the offense, such a restoration is not a constructive condonation of the desertion and the individual so restored remains subject to trial.

g. ***Former punishment.***—Non-judicial punishment previously imposed under Article 15 for a minor offense may be interposed in bar of trial for the same offense. For a definition of "minor offense," see 128*b*. Such punishment, however, does not bar trial for another crime or offense growing out of the same act or omission. For instance, punishment under Article 15 for the careless discharge of a firearm would not bar trial for involuntary manslaughter if the careless act caused a death. See Article 15*e*.

h. ***Promised immunity.***—See 148*e* (Testimony of accomplices).

69. MOTIONS TO GRANT APPROPRIATE RELIEF.—*a.* ***General.***—A motion to grant appropriate relief is one made to cure a defect of form or substance which impedes the accused in properly preparing for trial or conducting his defense. Among the objections which may be raised by such a motion are defects in charges and specifications which do not amount to a failure of the charge to allege an offense (69*b*), a substantial defect in the conduct of the pretrial investigation (see 34, 69*c*, Art. 32), prejudicial joinder in a joint trial (69*d*), and misjoinder in a common trial (33*l*, 69*d*). In general these objections are waived if not asserted prior to the entry of a plea, but the court may grant relief from the waiver for good cause (67*b*). The motion should briefly and clearly set forth the nature of and the grounds for the request, objection, or questions it is intended to make or raise. The motion admits nothing as to either the jurisdiction of the court or the merits of the case.

b. ***Defects in charges and specifications.***—(1) *General.*—If a specification, although alleging an offense cognizable by courts-martial, is defective in some matters of form as, for example, that it is inartfully drawn, indefinite, redundant, or that it misnames the accused, or is laid under the wrong article, or does not contain sufficient allegations as to time and place, the objection should be raised by motion for appropriate relief.

(2) *When accused is not misled.*—If it clearly appears that the accused has not in fact been misled by the form of the charges and specifications, and that a continuance is not necessary for the protection of his substantial rights, the court may proceed immediately with the trial upon directing an appropriate amendment of the defective charge or specification.

(3) *When accused may be misled.*—If the specification is defective to the extent that it does not fairly apprise the accused of the particular offense charged, the court, upon the defect being brought to its attention, will, according to the circumstances, direct the specification to be stricken and disregarded, or continue the case to allow the trial counsel to apply to the convening authority for directions as to further proceedings, or permit the specification to be amended so as to cure the defect, and continue the case for such time as in the opinion of the court may suffice to enable the accused properly to prepare his defense in view of the amendment.

In determining which of the courses mentioned in the preceding subparagraph is to be followed, the court will exercise its sound discretion in the light of the circumstances of each particular case. The following discussion is intended to provide guidance only and is not to be considered as providing a solution for every case.

When a defective specification alleges a relatively minor offense, and there remain before the court one or more specifications alleging serious offenses as to which a delay of the trial might prejudice the interests of the accused or the Government, the court may strike the defective specification and proceed with the trial of the remaining offenses charged.

Proper occasions for amending a defective specification and continuing the case may arise when the prosecution is prepared to propose an appropriate amendment which, without changing the nature of the offense charged, supplies sufficient particulars to enable the accused properly to prepare his defense.

Whenever the trial counsel is not prepared to propose an appropriate amendment to a defective specification, or when a proposed amendment to such a specification would change the nature of the offense intended to be alleged and when the interests of justice do not require that the defective specification be stricken in order that the trial may proceed with respect to other specifications, the court may continue the case in order to permit the trial counsel to refer the matter to the convening authority. This procedure is also appropriate in any case when the court is in doubt as to the proper relief which should be granted with respect to a defective specification.

c. ***Defects arising out of the pretrial investigation.***—A substantial failure to comply with the requirements of 34 and Article 32 may be brought to the attention of the court by a motion for appropriate relief. Such a motion should be sustained only if the accused shows that the defect in the conduct of the investigation has in fact prevented him from properly preparing for trial or has otherwise injuriously affected his substantial rights. If the motion is sustained the court may grant a continuance to enable the accused to prepare his defense properly, or may adjourn the proceedings to permit compliance with 34 and Article 32 and report the basis of its action to the convening authority. The latter may, after taking necessary action to cure the defect, return the record to the court with instructions to proceed with the trial.

d. ***Motion to sever.***—A motion to sever is a motion by one of two or more co-accused to be tried separately from the other or others. Occasion for the motion may arise in either a joint or a common trial.

In a common trial a motion to sever will be liberally considered. It should be granted on the motion of an accused arraigned in a common trial with other accused against whom offenses are charged which are unrelated to those charged against the mover (33*l*).

The motion should be granted in any case if good cause is shown; but when the essence of the offense is a combination between the parties—conspiracy, for instance—the court may properly be more exacting than in other cases as to whether the facts established in support of the motion constitute good cause. The more common grounds for this motion are that the mover desires to use at his trial the testimony of one or more of his co-accused, or the testimony of the wife of one, or that a defense of the other accused is antagonistic to his own, or that evidence as to the other accused will in some manner prejudice his defense.

If the motion is granted, the court will first decide which accused it will proceed to try and, in the case of joint charges, direct an appropriate amendment of the charges and specifications. For instance, if after severance the court proceeds with the trial of B in a case in which A and B have been jointly charged with an offense, the specification should be amended to allege, in effect, either that B committed the offense or that B committed the offense in conjunction with A. The amendment should be formally made as a part of the proceedings, no actual alteration being made in the charge sheet itself. For an example see the procedural guide, appendix 8*a*. When, as a result of action on a motion to sever, trial of one or more accused is deferred, the trial counsel will report the facts at once to the convening authority so that he may take appropriate action to try the deferred accused or to make other disposition of the charges as to such accused.

e. ***Miscellaneous motions for relief.***—In addition to grounds for motions discussed above in this paragraph (69), there are others which may be made for the purpose of raising a specific objection on the merits prior to trial of the general issue. For examples, see 121 and 122 (Insanity). If a motion amounts in substance to an application for a continuance, or to a challenge, motion to dismiss, or other matter for which a procedure is provided, the motion will be regarded as such application, challenge, motion to dismiss, or other matter. A motion to elect—that is, a motion that the prosecution be required to elect upon which of two or more charges or specifications it will proceed—will not be granted.

70. PLEAS.—*a.* ***General.***—In court-martial procedure, pleas include guilty, not guilty, and pleas corresponding to permissible findings of lesser included offenses. See 74*b* (3). The court may refuse to accept a plea of guilty and should not accept the plea without first determining that it is made voluntarily with understanding of the nature of the charge. If an accused arraigned before a court-martial makes any irregular pleading, or after a plea of guilty sets up matters inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty (Art. 45*a*). The term "irregular pleading" includes such contradictory pleas as guilty without criminality or guilty to a charge after pleading not guilty to all specifications thereunder.

A plea of guilty by the accused shall not be received to any charge or specification alleging an offense for which the death penalty may be adjudged (Art. 45*b;* see 15*a* (3)), but a plea of guilty may be received as to a noncapital offense which is necessarily included in a capital offense alleged.

Except as to matters covered by a plea of guilty, a plea admits nothing as to the jurisdiction of the court and nothing as to the merits of the case. Any admission or waiver involved in a plea of guilty to any offense has effective existence only as long as the plea stands. A plea of not guilty or guilty will, in the absence of a motion to grant appropriate relief, be regarded as a waiver of any objection which must be raised by such motion before plea, including any objection based on a misnomer of the accused whether under an alias or otherwise. See 67*b*. By standing mute an accused does not waive any objections otherwise waived by a plea.

The accused has a legal and moral right to enter a plea of not guilty even if he knows he is guilty. This is so because his plea of not guilty amounts to nothing more than a statement that he stands upon his right to cast upon the prosecution the burden of proving his alleged guilt.

A plea of guilty does not exclude the taking of evidence, and in the event that there be aggravating or extenuating circumstances not clearly shown by the specification and plea, any available and admissible evidence as to such circumstances may be introduced. If a plea of guilty to a lesser included offense is entered the trial counsel shall proceed with the prosecution of the offense charged.

b. ***Procedure if plea of guilty is entered.***—The following procedure is prescribed for all cases in which a plea of guilty is entered:

(1) In general and special court-martial cases, the plea of guilty will be received only after the accused has had an opportunity to consult with the counsel appointed for or selected by him. If the accused has refused counsel, the plea should not be received.

(2) Before accepting a plea of guilty the meaning and effect thereof will be explained to the accused by the law officer of a general court-martial, or the president of a special court-martial or by the summary court-martial unless it otherwise affirmatively appears that the accused understands the meaning and effect thereof. See 53*h*. Such explanation will include the following—

That the plea admits every act or omission alleged and every element of the offense charged (or of the lesser included offense to which it relates) and authorizes conviction of the offense to which the plea relates without further proof;

That the maximum punishment authorized for the offense to which the accused has pleaded guilty may be adjudged upon conviction thereof;

That unless the accused indicates that he understands the meaning and effect of the plea as explained, the plea of guilty will not be accepted. See appendix 8*a* for an example of such explanation.

(3) The explanation made and the reply of the accused thereto will be set forth verbatim in the record of trial of a general court-martial or of a special court-martial in which a verbatim record is kept. In other records of trial by special court-martial the substance of the explanation and reply will be set forth in the record of trial. In records of trial by summary court-martial, the fact that a plea of guilty was explained will be recorded in the space provided.

(4) The question whether the plea will be received will be treated as an interlocutory one.

Whenever an accused, in the course of trial following a plea of guilty, makes a statement to the court, in his testimony or otherwise, inconsistent with the plea, the court will make such explanation and statement as the occasion requires. If, after such explanation and statement, it appears to the court that the accused in fact entered the plea improvidently or through lack of understanding of its meaning and effect, or if the accused does not voluntarily withdraw his inconsistent statement, the court will proceed to trial and judgment as if he had pleaded not guilty. See Article 45*a*. Occasion for making this explanation and statement frequently arises in desertion cases when the accused, after pleading guilty testifies or states in effect that throughout his unauthorized absence he had the intention of returning. When, after a plea of guilty has been received, the accused asks to be allowed to withdraw it and substitute a plea of not guilty or a plea to a lesser included offense he should be permitted to do so. Whenever a plea of guilty previously entered is set aside the prosecution will be given an opportunity to reopen its case and produce any available evidence which it did not introduce in view of the plea of guilty.

One plea may be entered as applicable to all or to certain specified charges and specifications, such as "Not guilty to all charges and specifications."

71. MOTIONS PREDICATED UPON THE EVIDENCE.—*a.* ***Motion for finding of not guilty.***—The court on motion of the defense may enter a finding of not guilty as to one or more offenses charged after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a motion for a finding of not guilty at the close of the evidence offered by the prosecution is not granted, the defense may offer evidence without having reserved the right to do so. But if all the evidence in the record, whether adduced by the defense or the prosecution, or both, is sufficient to sustain a conviction, such conviction need not be set aside upon review merely because the court erred in denying such motion for a finding of not guilty at the time it was made.

The court in its discretion may require that the motion specifically indicate wherein the evidence is legally insufficient. The court will determine the matter as an interlocutory question. See 57 and Article 51*b*. If there is any substantial evidence which, together with all proper inferences to be drawn therefrom and all applicable presumptions, reasonably tends to establish every essential element of an offense charged or included in any specification to which the motion is directed, the motion will not be granted. The court in its discretion may defer action on any such motion as to any specification and permit or require the trial counsel to reopen the case for the prosecution and to produce any available evidence. If the motion is sustained as to any specification, the ruling amounts to a finding of not guilty of such specification and, when appropriate, of the proper charge.

b. ***Res judicata.***—The defense of *res judicata* is based on the rule that any issue of fact or law put in issue and finally determined by a court of competent jurisdiction cannot be disputed between the same parties in a subsequent trial even if the second trial is for another offense. The accused, in a proper case, may assert an issue of fact finally determined by an acquittal as a defense. Thus, if B has been acquitted by a court-martial (or by any court wherein the United States, any of its Territories or possessions, or their political subdivisions, or the District of Columbia was a party) of having committed an assault with a knife upon A, B can assert the acquittal as a defense if, upon the subsequent death of A as a result of the wound inflicted in the assault, B is later tried for murder, although the defense of former jeopardy might not be available to him (68*d*). A motion raising the defense of *res judicata* should ordinarily be made after the prosecution has rested its case or later unless it can be shown at an earlier stage of the trial that the issue of fact or law in the case on trial and in the case relied upon to sustain the motion are the same. Proof of the former adjudication may be made by the record of the trial relied upon to sustain the motion. Generally, *res judicata* will not be asserted by the prosecution in any trial by court-martial. However, with respect to jurisdiction of an offense committed prior to a fraudulent separation, a final conviction of fraudulent separation in violation of Article 83 (2) may be shown by the prosecution as a final adjudication of such fraudulent separation and the accused may not dispute the jurisdiction of the court as to the earlier offense on the ground that his separation from the service was not fraudulent. See Article 3*b*.

Chapter XIII

MATTERS RELATED TO FINDINGS AND SENTENCE

ARGUMENTS—INSTRUCTIONS—FINDINGS—PRESENTENCING PROCEDURE—SENTENCE—CONCLUSION OF THE TRIAL

72. ARGUMENTS.—*a. General.*—After both sides have rested, arguments may be made to the court by the trial counsel, the accused, and his counsel. The trial counsel has the right to make the opening argument and, if any argument is made on behalf of the defense, the closing argument. The closing argument of the trial counsel is generally limited to the discussion of propositions or matters argued by the defense. If the trial counsel is permitted by the court to introduce new matter in his closing argument, the defense should be afforded an opportunity to reply thereto, but this will not preclude the trial counsel from presenting a final argument.

If the arguments indicate that a plea of guilty was entered improvidently, the court will take appropriate action as indicated in 70.

Arguments of counsel may be oral, in writing, or both. See 82*b* (4) in this connection.

b. Content.—A reasonable latitude should be allowed counsel in presenting their arguments. Restricting argument, particularly in long and complicated cases, may constitute error; however, the court may in its discretion limit argument when it is trivial or mere repetition.

Counsel may make a reasonable comment on the evidence and may draw such inferences from the testimony as will support his theory of the case. The testimony, conduct, motives, and evidence of malice on the part of witnesses may, so far as disclosed by the evidence, be commented upon. It is improper to state in an argument any matter of fact as to which there has been no evidence. A party may, however, argue as though the testimony of his own witnesses conclusively established facts related by them.

The prosecution may not comment upon the failure of the accused to take the witness stand; however, if the accused has testified on the merits with respect to an offense charged, and if he fails in such testimony to deny or explain specific facts of an incriminating nature that the evidence of the prosecution tends to establish with respect to that offense, such failure may be commented upon. When an accused is on trial for a number of offenses and has testified to one or more of them only, no comment can be made on his failure to testify as to the others.

Refusal of a witness to answer a proper question may be commented upon. As to permissible comments on the fact that one witness testified after hearing another, see 149*a* (Examination of witnesses).

c. ***Improper argument.***—Argument should not be interrupted by the other side or by the court unless it becomes improper, in which case it may be appropriate for the court to order that the argument be confined to proper matters, and that any improper part already made be disregarded.

73. INSTRUCTIONS.—*a.* ***Elements of the offense.***—After closing arguments have been concluded, the law officer (president of a special court-martial) will instruct the court as to the elements of each offense charged. Information as to the elements of an offense may be obtained from the subparagraphs entitled "Discussion" and "Proof" which appear in the discussion of the punitive article under which the offense is charged. See chapter XXVIII. The instruction may be given in the language of the applicable subparagraph. If there is any doubt as to the elements of a particular offense, the law officer (president of a special court-martial) may call upon the trial counsel to produce any law available on the matter, including information or instructions on the law from the convening authority.

b. ***Charging the court.***—After instructing the court as to the elements of each offense charged, the law officer (president of a special court-martial) shall, in all cases, including those in which a plea of guilty has been entered, charge the court (Art. 51*c*):

(1) That the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) That in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and he shall be acquitted;

(3) That if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) That the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the Government.

To the foregoing, explanatory matter may, but need not, be added.

c. ***Additional instruction by law officer.***—(1) *General.*—The law officer is not required to give the court any instructions other than those required by Article 51*c* (73*a*, *b*). However, when he deems it necessary or desirable, he may give the court such additional instructions as will assist it in making its findings. For example, he may, in an appropriate case, make a simple and orderly statement of the issues of fact, summarize and comment upon the evidence that tends to support or deny such issues, and discuss the law applicable thereto. The law officer may advise the court as to what offenses, if any, are included in an offense charged and the possible findings the court may make by way of exceptions and substitutions. If the accused has pleaded guilty to an offense and the plea still stands, the law officer should invite the attention of the court to the fact that no further proof of the offense to which the plea relates need be introduced by the prosecution to warrant a finding of guilty of that offense. In this connection, see 70.

In summarizing or commenting upon the evidence, the law officer should use the greatest caution to insure that his remarks do not extend beyond an accurate, fair, and dispassionate statement of what the evidence shows, both in behalf of the prosecution and the defense. He should not depart from the role of an impartial judge, or assume the role of a partisan advocate. He should not assume as true the existence or nonexistence of a material fact in issue as to which the evidence is conflicting, as to which there is dispute, or which is not supported by the evidence, and he should make it clear that the members of the court are left free to exercise their independent judgment as to the facts.

All additional instructions given by the law officer will be given in open court in the presence of the accused and counsel for both sides. The accused and counsel may not interrupt the law officer while he is instructing the court.

(2) *Preparing additional instructions.*—If the law officer deems it necessary or desirable that the court be given additional instructions, he may recess the court so that he may have time to prepare such instructions; he may request counsel for both sides to furnish him with proposed additional instructions as to a particular issue in the case or as to any or all of the offenses charged. Counsel need not submit proposed instructions even when requested to do so by the law officer. Any proposed instructions submitted by counsel will be presented in writing to the law officer and copies will be furnished to the opposing counsel. The law officer may accept, reject, or modify any proposed instruction that is submitted, and may substitute instructions of his own or refuse to give any instructions on a matter included in a proposed instruction submitted by counsel. However, he will cause all proposed instructions to be marked for identification and appended to the record of trial for the consideration of the convening authority. The law officer may permit counsel to present argument upon proposed instructions. The members of the general court-mar-

tial will be excluded during the presentation of any argument upon a proposed instruction and, as a general rule, such argument will not be recorded. However, the law officer may direct that any argument, or part thereof, made upon a proposed instruction be recorded, transcribed, marked for identification, and appended to the record of trial for the consideration of the convening authority.

74. **FINDINGS.**—*a.* ***General.***—In addition to such instructions as may be given in open court by the law officer (president of a special court-martial), the court will observe the following rules when it is making its findings:

(1) *Basis of findings.*—Only matters properly before the court as a whole may be considered. A member should not, for instance, be influenced by any knowledge of the acts, character, or service of the accused not based on the evidence or other proper matter before the court; by any opinions not properly in evidence; or by motives of partiality, favor, or affection. Matters as to which comment in argument is prohibited cannot be considered.

(2) *Weighing evidence.*—In weighing the evidence a member is expected to utilize his common sense and his knowledge of human nature and of the ways of the world. In the light of all the circumstances of the case he should consider the inherent probability or improbability of the evidence, and, with this in mind, he may properly believe one witness and disbelieve several witnesses whose testimony is in conflict with that of the one. In this connection, see 153 (Credibility of witnesses) and 140*a* (Confessions and admissions).

(3) *Reasonable doubt.*—In order to convict of an offense the court must be satisfied beyond a reasonable doubt that the accused is guilty thereof. By "reasonable doubt" is intended not fanciful or ingenious doubt or conjecture but substantial, honest, conscientious doubt suggested by the material evidence, or lack of it, in the case. It is an honest, substantial misgiving, generated by insufficiency of proof of guilt. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or court and unwarranted by the testimony; nor a doubt born of a merciful inclination to permit the accused to escape conviction; nor a doubt prompted by sympathy for him or those connected with him. The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt; what is required is not an absolute or mathematical certainty but a moral certainty. A court-martial which acquits because, upon the evidence, the accused may possibly be innocent, falls as far short of appreciating the proper amount of proof required in a criminal trial as does a court which convicts on a mere possibility that the accused is guilty.

The rule as to reasonable doubt extends to every element of the offense. If, in a trial for desertion with intent to remain away permanently, a reasonable doubt exists as to such intent, the accused cannot properly be convicted as charged, although he might be convicted of the lesser included offense of absence without proper authority (app. 12). It is not necessary that each particular fact advanced by the prosecution be proved beyond a reasonable doubt; it is sufficient to warrant conviction if, on the whole evidence, the court is satisfied beyond a reasonable doubt that the accused is guilty. Prima facie proof of an essential element of an offense does not preclude the existence of a reasonable doubt with respect to that element. The court may decide, for instance, that the prima facie evidence presented does not outweigh the presumption of innocence. With respect to making and weighing presumptions, see 138*a*.

If a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused cannot legally be convicted of that offense. See 120*b* as to the standard of mental responsibility and 122 as to the burden of proof and presumption of sanity.

A reasonable doubt may arise from the insufficiency of circumstantial evidence, and such insufficiency may be with respect either to the evidence of the circumstances themselves or to the strength of the inferences drawn from them. When the only competent evidence of the commission of an offense is circumstantial in nature, the inference to be drawn from such evidence must not only prove all the elements of the offense, but must at the same time exclude every reasonable hypothesis of innocence.

b. ***Findings as to the specifications.***—(1) *General.*—Permissible findings include guilty; not guilty; guilty with exceptions, with or without substitutions, and not guilty of the exceptions and guilty of any substitutions, as stated below.

The finding as to a specification should be consistent throughout. A finding of guilty without criminality should not be made.

When two or more accused are tried jointly, the findings as to each accused should be stated separately. Any different findings as to two or more joint accused should be consistent with one another. Thus, if A and B are joint accused and the court finds B guilty of the offense charged and finds A not guilty, B should be found guilty by excepting from the specification the name of A and the words in the specification which indicate that the offense was a joint one.

(2) *Exceptions and substitutions.*—One or more words or figures may be excepted and, when necessary, others substituted, provided the facts as so found constitute an offense by an accused which is punishable by the court, and provided that such action does not change the

nature or identity of any offense charged in the specification or increase the amount of punishment that might be imposed for any such offense. The substitution of a new date or place may, but does not necessarily, change the nature or identity of an offense. For action to be taken when the evidence indicates an offense not charged, see 55.

(3) *Lesser included offenses.*—If the evidence fails to prove the offense charged but does prove the commission of an offense necessarily included in that charged or of an attempt to commit the offense charged or of an offense necessarily included therein, the court may by its findings except appropriate words and figures of the specification, and, if necessary, substitute others, finding the accused not guilty of the excepted matter but guilty of the substituted matter. For a discussion of included offenses, see 158; for a discussion of attempts, see 159.

A table listing some commonly included offenses appears in appendix 12.

(4) *Offenses arising out of the same act or transaction.*—The accused may be found guilty of two or more offenses arising out of the same act or transaction, without regard to whether the offenses are separate. In this connection, however, see 76*a* (8).

c. ***Findings as to the charges.***—Permissible findings include guilty; not guilty; not guilty, but guilty of a violation of Article——. An attempt should be found as a violation of Article 80 unless the attempt is included in the express terms of some other article. For examples, see Articles 85, 94, 100, 104, and 128.

The finding as to a charge should not be inconsistent with, but should support, the findings as to the specifications thereunder. Thus, if two specifications of desertion are under one charge and the accused is found guilty of the first specification, but guilty of absence without leave only as to the second specification, the finding as to the charge should be: Of the Charge: As to Specification 1: Guilty. As to Specification 2: Not guilty, but guilty of a violation of Article 86. A finding of guilty of one specification appropriate to its charge requires a finding of guilty of the charge, but a finding of not guilty of another such specification under that charge does not require any finding of the charge as to it. Thus, upon finding an accused guilty of one of the two specifications under a proper charge, and not guilty of the other, the finding as to the charge should be simply guilty.

A court may not find an offense as a violation of an article under which it was not charged solely for the purpose of increasing the authorized punishment or for the purpose of adjudging less than the prescribed mandatory punishment.

d. ***Procedure.***—(1) *General.*—After the law officer (president of a special court-martial) has instructed the court as prescribed in 73, the court will close to deliberate and vote on the findings. Only the members of the court will be present. Deliberation may properly include full and free discussion as to the merits of the case. The influence of superiority in rank shall not be employed in any manner in an attempt to control the independence of members in the exercise of their judgment.

(2) *Voting.*—Voting is by secret written ballot (Art. 51*a*) and is obligatory. The order in which the several charges and specifications are to be voted upon will ordinarily be determined by the president, subject to the objection of a majority of the court, except that all the specifications under a charge shall precede that charge. The members normally vote upon a specification or charge by marking on their ballots: "Guilty;" "Not guilty;" or "Not guilty, but guilty of ——." The junior member of the court shall in each case count the votes; the count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court (Art. 51*a*).

(3) *Number of votes required.*—No person shall be convicted of an offense for which the death penalty is made mandatory by law (i. e., Art. 106), except by the concurrence of all the members of the court-martial present at the time the vote is taken. No person shall be convicted of any other offense, except by the concurrence of two-thirds of the members present at the time the vote is taken (Art. 52). If, in computing the number of votes required, a fraction results, such fraction will be counted as one; thus, if five members are to vote, a requirement that two-thirds concur is not met unless four concur. A finding of not guilty results as to any specification or charge if no other valid finding is reached thereon; however, a court may reconsider any finding before the same is formally announced in open court. The court may also reconsider any finding of guilty on its own motion at any time before it has first announced the sentence in the case.

e. Requesting additional instructions.—If, during its deliberation on the findings, a general court-martial is in doubt as to the applicability of the law or the effect of certain evidence in a case, such as whether it may make a finding of guilty of a specification by substitutions and exceptions, or whether there is any lesser included offense of which it may find the accused guilty, it may open and request additional instructions from the law officer. Such instructions will be given in open court in the presence of the accused and counsel for both sides and will be made a part of the record.

If a special court-martial desires additional information on the subjects mentioned in the above subparagraph, it may open and request counsel for both sides to present legal authorities on the question, or it may direct the trial counsel to obtain such information from the convening authority. The proceedings, including any information that is given the court by the trial counsel pursuant to such direction, will be in open court in the presence of the accused and his counsel and will be made a part of the record.

f. ***Form of the findings.***—(1) *General court-martial.*—After a general court-martial has finally voted on the findings, it may request the law officer and the reporter to appear before it to put the findings in proper form, and such proceedings shall be made a part of the record. See Article 39. The president shall speak for the court in discussing the findings with the law officer and he shall be careful not to disclose the vote of any particular member of the court; he may, however, indicate whether a finding was concurred in by two-thirds or all of the members, as the case may be. See Article 52*a* in this connection.

(2) *Special court-martial.*—A special court-martial puts its findings in proper form in closed session, following the forms indicated in appendix 8*a* and the instructions contained in 74*b* and *c*.

(3) *Reason for findings.*—No finding should include any indication of the reasons for making it. For the information of the convening authority—but not as part of a finding—in its discretion the court may formulate for inclusion in the record a statement of the reasons which led to a finding and a statement of the weight given to certain evidence. Proper occasions for such action may arise, for example, when the court finds an accused not guilty because of a reasonable doubt as to his sanity, or because of the operation of the statute of limitations. See 122*c* and 68*c*, respectively.

g. ***Announcing the findings.***—As soon as a court-martial has determined the findings in a case, it will announce them in open court in the presence of the law officer, counsel, and the accused. Only the required percentage of members who concurred in findings of guilty should be announced.

h. ***Statute of limitations.***—If by exceptions and substitutions an accused is found guilty of a lesser included offense to which he has not entered a plea, and against which it appears that the statute of limitations (Art. 43) has run, the law officer (president of a special court-martial) will, as soon as such a finding is announced, advise him in open court of his right to avail himself of the statute in bar of punishment. If an accused interposes the statute in bar of punishment, the issue will be determined in substantially the same manner as a motion to dismiss on the grounds of the statute of limitations (68*c*).

However, if an accused pleaded guilty to a lesser included offense and persisted in his plea after the meaning and effect thereof had been explained to him, including his right to interpose the statute of limitations as to the lesser included offense, he is deemed to have waived the right to interpose the statute of limitations in bar of punishment for such offense as long as his plea of guilty stands. Under these circumstances an accused may not, after a finding of guilty of such lesser included offense, assert the statute in bar of punishment.

75. PRESENTENCING PROCEDURE.—*a.* ***General.***—After the court has announced findings of guilty, the prosecution and defense may present appropriate matter to aid the court in determining the kind and amount of punishment to be imposed.

Matter which is presented to the court after findings of guilty have been announced may not be considered as evidence against the accused in determining the legal sufficiency of such findings of guilty upon review. If any matter inconsistent with a plea of guilty is received, or if it appears from any matter received that a plea of guilty was entered improvidently, the court should take the action outlined in 70.

b. ***Matter presented by the prosecution.***—(1) *Data as to service.*—The trial counsel will read to the court from the first page of the charge sheet the data as to the age, pay, and service of the accused, and the duration and nature of any restraint imposed prior to trial. If the defense objects to such data as being inaccurate or incomplete in a specified material particular, or as containing certain specified objectionable matter, the court shall determine the issue. Objections not asserted may be regarded as waived.

(2) *Evidence of previous convictions.*—The trial counsel will next introduce evidence of any previous convictions of the accused by courts-martial. Such evidence is not limited to offenses similar to the one of which the accused stands convicted. The evidence must, however, relate to offenses committed during a current enlistment, voluntary extension of enlistment, appointment, or other engagement or obligation for service of the accused, and during the three years next preceding the commission of any offense of which the accused stands convicted. When the last enlistment, appointment, or other engagement or obligation for service was terminated under other than honorable conditions, or when the accused deserted and subsequently fraudulently enlisted, all convictions by courts-martial of offenses committed in the prior term of service, if within the three-year period, are admissible, even though such prior term of service was in an armed

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force other than the one is which he is serving at the time of trial. In computing the three-year period, periods of unauthorized absence as shown by the findings in the case or by the evidence of previous convictions should be excluded.

For the purpose of determining the admissibility of previous convictions, retention of an accused beyond the normal expiration date of his term of service by operation of law shall not be deemed to create a new enlistment, a voluntary extension of enlistment, a new appointment, or other new engagement or obligation for service.

Unless the accused has been tried for an offense within the meaning of Article 44*b*, evidence as to the offense is not admissible as evidence of a previous conviction. See 68*d* (Former jeopardy).

Subject to the rules as to documentary evidence, including the rules as to the use of copies, previous convictions may be proved by the order publishing the result of trial. Ordinarily, however, they are proved by the service record of the accused or an admissible copy or extract copy thereof. In the absence of objection, an offense may be regarded as having been committed during the prescribed three-year period unless the contrary appears. If the defense objects, the court shall determine the issue.

(3) *Matter showing aggravation of an offense to which a plea of guilty has been entered.*—If a finding of guilty of an offense is based upon a plea of guilty and available and admissible evidence as to any aggravating circumstances was not introduced before the findings, the prosecution may introduce such evidence after the findings are announced. See 70 in this connection.

c. ***Matter presented by the defense.***—(1) *General.*—Whether or not it introduced evidence on the issue of guilt or innocence, the defense may, after findings of guilty are announced and before the court closes to vote on the sentence, introduce matter in extenuation or mitigation. With respect to matter in extenuation and mitigation offered by the defense, the court may relax the rules of evidence to the extent of receiving affidavits, certificates of military and civil officers, and other writings of similar apparent authenticity and reliability. See 137 and 146*b* in this connection.

(2) *Statement of accused.*—Whether or not he testified on the issue of guilt or innocence or as to matters in extenuation or mitigation, the accused may make an unsworn statement to the court in mitigation or extenuation of the offenses of which he stands convicted, but the right to make such an unsworn statement does not permit the filing of the affidavit of the accused. This unsworn statement is not evidence, and the accused cannot be cross-examined upon it, but the prosecution may rebut statements of fact therein by evi-

dence. The statement may be oral or in writing, or both. It may be made by the accused, by counsel, or by both. The statement should not include what is properly argument, but ordinarily the court will not stop a statement on that ground if it is being made orally and personally by the accused.

(3) *Matter in extenuation.*—Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of the offense, including the reasons that actuated the accused but not extending to a legal justification. In this connection, see the illustration in the second subparagraph of 139*b*.

(4) *Matter in mitigation.*—Matter in mitigation has for its purpose the lessening of the punishment to be assigned by the court or the furnishing of grounds for a recommendation for clemency. The fact that non-judicial punishment under Article 15 has been imposed and enforced against the accused may be shown by the accused as a factor in mitigation upon trial for an offense growing out of the same act or omission for which such punishment was imposed and enforced. See 68*g*. Such matter may include particular acts of good conduct or bravery. It may exhibit the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other traits that go to make a good officer or enlisted person. For example, the accused may introduce evidence of the character given him on any former discharge from the military service, subject to the right of the prosecution to introduce in rebuttal evidence of the character given the accused on other discharges from the service.

d. ***Rebuttal evidence.***—After matter in aggravation, extenuation, or mitigation has been introduced the prosecution or defense has the right to cross-examine any witnesses and to offer evidence in rebuttal.

76. SENTENCE.—*a.* ***Basis for determining.***—In determining the kind and amount of punishment to be imposed, the court should consider the following matters:

(1) Except for an offense for which a mandatory punishment is prescribed, the determination of a proper punishment for an offense rests within the discretion of the court subject to the limitations prescribed in chapter XXV and by the article violated. See particularly the Table of Maximum Punishments (127*c*). To the extent that punishment is discretionary, the sentence should provide a legal, appropriate, and adequate punishment. In this connection see 33*h*.

(2) When applicable, the Table of Maximum Punishments prescribes the maximum limits authorized for each offense listed therein. Normally the maximum punishment will be reserved for

an offense which is aggravated by the circumstances, or after conviction of which there is received by the court evidence of previous convictions of similar or greater gravity. In the exercise of its discretion in adjudging a sentence, the court should consider evidence contained in the record respecting the character of the accused as given in former discharges, the number and character of previous convictions, the nature and duration of any pretrial restraint, and the circumstances extenuating or aggravating the offense. It must also consider collateral features which limit the punishment—such as value in larceny, the length of absence in absence without leave, or the fact that the convening authority has directed that a capital case be treated as not capital (Art. 49). For matters to be considered upon a rehearing, see 81*d*. See 145*b* and Article 50 for limitations resulting from the use by the prosecution of testimony contained in a record of a court of inquiry.

(3) Although evidence of previous convictions may always be considered in determining the proper measure of punishment, evidence of previous convictions of offenses materially less grave than the offense or offenses of which the accused stands convicted is not to be regarded as in itself justifying a sentence of maximum severity.

(4) Among other factors which may properly be considered are the penalties adjudged in other cases for similar offenses. With due regard for the nature and seriousness of the circumstances attending each particular case, sentences should be relatively uniform throughout the armed forces. In special circumstances, to meet the needs of local conditions, sentences more severe than those normally adjudged for similar offenses may be necessary. Courts will, however, exercise their own discretion, and will not adjudge sentences known to be excessive in reliance upon the mitigating action of the convening or higher authority. Comments with respect to matters proper for consideration in fixing the punishment are made in other connections. For example, see 123 (Mental impairment or deficiency), 127*c* (Permissible additional punishments). See also 16*b*, 126*e*, 154*a*, and 174*b*.

(5) The imposition by courts-martial of inadequate sentences upon military persons convicted of crimes which are punishable by the civil courts tends to bring the armed forces into disrepute as lacking in respect for the criminal laws of the land.

(6) Dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized by the civil law as

felonies, or of offenses of a military nature requiring severe punishment.

(7) A bad conduct discharge may be imposed in any case in which a dishonorable discharge may be imposed as well as in certain other cases. It is a less severe punishment than dishonorable discharge and is designed as a punishment for bad conduct rather than as a punishment for serious offenses of either a civil or military nature. It is appropriate as punishment for an accused who has been convicted repeatedly of minor offenses and whose punitive separation from the service appears to be necessary.

(8) The maximum authorized punishment may be imposed for each of two or more separate offenses arising out of the same act or transaction. The test to be applied in determining whether the offenses of which the accused has been convicted are separate is this: The offenses are separate if each offense requires proof of an element not required to prove the other. Thus, if the accused is convicted of escape from confinement (Art. 95) and desertion (Art. 85)—both offenses arising out of the same act or transaction—the court may legally adjudge the maximum punishment authorized for each offense because an intent to remain permanently absent is not a necessary element of the offense of escape, and a freeing from restraint is not a necessary element of the offense of desertion. An accused may not be punished for both a principal offense and for an offense included therein because it would not be necessary in proving the included offense to prove any element not required to prove the principal offense.

b. ***Procedure.***—(1) *Advice as to maximum punishment.*—Before a general court-martial closes to deliberate and vote on the sentence, the law officer may advise it of the maximum punishment which may be adjudged for each of the offenses of which the accused has been found guilty. If a special court-martial has any question as to the maximum punishment it may adjudge in a particular case, it may request the trial counsel to procure and present this information to the court. Such advice and information will be given in open court in the presence of the accused and counsel for both sides and shall be made a matter of record.

(2) *Deliberation and voting.*—The court sits in closed session during deliberation and voting upon the sentence. Only the members of the court will be present. Deliberation may properly include full and free discussion. The influence of superiority in rank shall not be employed in any manner in an attempt to control the independence of members in the exercise of their judgment.

When the discussion is completed, any member who desires to propose a sentence writes his proposal on a slip of paper. The junior member collects these proposed sentences and submits them to the president. The court then votes on the proposed sentences, beginning with the lightest, until a sentence is adopted by the concurrence of the required number of members. Voting is by secret written ballot. The junior member shall in each case collect and count the votes; the count shall be checked by the president who shall forthwith announce the result of the ballot to the members of the court.

It is the duty of each member to vote for a proper sentence for the offense or offenses of which the accused has been found guilty, without regard to his opinion or vote as to the guilt or innocence of the accused. Any sentence, even in a case where the punishment is mandatory, must have the concurrence of the required number of members.

(3) *Number of votes required.*—No person shall be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken. No person shall be sentenced to life imprisonment or to confinement in excess of ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken. All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken. See Article 52*b*. If, in computing the number of votes required, a fraction results, such fraction will be counted as one; thus, if six members are to vote, a requirement that three-fourths concur is not met unless five concur.

(4) *Form of sentence.*—Forms of sentences appear in appendix 13. The sentence adjudged should follow one of these forms or a combination or modification of such forms. For the information of the convening authority—but not as a part of the sentence itself—the court may formulate for inclusion in the record a brief statement of the reasons for the sentence.

c. ***Announcing sentence.***—As soon as it has determined the sentence, the president will announce the sentence in open court in the presence of the law officer, the accused, and counsel for both sides. Only the required percentage of members who concurred in the sentence should be announced. If the law officer of a general court-martial notes any ambiguity or apparent illegality in the sentence as announced by the court, he should bring the irregularity to the attention of the court so that it may close to reconsider and correct the sentence. The court may not, however, reconsider the sentence with a view to increasing its severity after the sentence has been announced unless the sentence prescribed for the offense of which the accused has been convicted is mandatory (Art. 62*b*). In a trial by special court-martial, an ambiguous or apparently illegal sentence may be called to the attention of the court by the trial counsel.

Within the limitations prescribed in this paragraph, the court may reconsider a sentence on its own motion at any time before the record of trial has been authenticated and transmitted to the convening authority. In such a case, however, all personnel of the court, the accused, counsel for both sides and, in a general court-martial, the law officer must be present.

77. CONCLUSION OF THE TRIAL.—*a.* ***Recommendation for clemency.***—After the sentence has been announced, the defense may submit in writing for attachment to the record any matters as to clemency which it desires to have considered by the members of the court or the convening authority. The rules of evidence are not applicable to such matters, but they should not be cumulative of matters presented to the court before the sentence was announced.

Mitigating circumstances which could not be taken into consideration in determining the sentence may be the basis of a recommendation for clemency by individual members of the court. The recommendation should represent the free and voluntary expression of the individuals who join therein. It should be specific as to the amount and character of the clemency recommended and as to the reasons for the recommendation.

A recommendation for clemency will never be based upon a doubt as to the guilt of the accused. If, contrary to law, such a recommendation is made, it will not impeach the finding of the court on the matter of guilt. The guilt or innocence of the accused is determined by the findings of the court, and, if the necessary number of members do not concur in a finding of guilt, the accused must be acquitted. A recommendation for clemency which clearly expresses a doubt as to guilt divulges the vote or opinion of any member making such a recommendation and thereby violates his oath.

b. ***Adjournment.***—At the conclusion of the case, the court may proceed to other business, adjourn until a definite time, or adjourn to meet at the call of the president.

c. ***Post trial matters.***—See 48*j* (2) as to the right of the defense to submit a brief of the matters which he desires to have considered in behalf of the accused on review.

As to the duty of trial counsel to notify the accused's commanding officer of the result of trial, see 44*e* (2). For preparation and authentication of the record, see chapter XVI.

Chapter XIV

PROCEDURE OF INFERIOR COURTS-MARTIAL

SPECIAL COURTS-MARTIAL—SUMMARY COURTS-MARTIAL

78. **SPECIAL COURTS-MARTIAL.**—Unless otherwise stated, the procedure of special courts-martial will, so far as practicable, be that prescribed for general courts-martial. The principal distinction in procedure between special and general courts is that in the former all rulings on interlocutory questions other than challenges are made by the president (there being no law officer), subject to objection by other members (57). Similarly, before the court closes to vote on the findings, the president of a special court-martial instructs the court as to the elements of each offense charged, the presumption of innocence, reasonable doubt, and burden of proof (73*a*, *b*). See also appendix 8*a*. With respect to the preparation of records of trial by special courts-martial, see 83 and appendices 9 and 10; as to the disposition of such records by the convening authority, see 91*b*.

79. **SUMMARY COURTS-MARTIAL.**—*a.* ***Function.***—The function of a summary court-martial is to exercise justice promptly for relatively minor offenses under a simple form of procedure. In the trial of the case the summary court represents both the Government and the accused. In the absence of a plea of guilty, he will thoroughly and impartially investigate both sides of the matter and will assure that the interests of both the Government and the accused are safeguarded. Unless otherwise stated, the procedure prescribed for a general court-martial will, when applicable, serve as a guide for a summary court-martial. See appendix 8*a* in this connection.

b. ***Power to obtain evidence.***—A summary court has the same power as the trial counsel of a general or special court-martial to compel the attendance of civilian witnesses by subpoena (115; Art. 46) and to take depositions in proper cases (117; Art. 49). To obtain the attendance of witnesses, the summary court will take action similar to that taken by the trial counsel of a general or special court-martial. In this connection, see 44*f* (2).

c. ***Examination of file.***—When charges are referred to a summary court-martial, the court will carefully examine the charges and allied papers to see that the charges are in proper form and that the data on the charge sheet and any evidence of previous convictions are complete and free from error of substance or form. The summary court will report to the convening authority any substantial irregularity in the charges or accompanying papers. Ordinarily, the court will correct and initial slight errors or obvious mistakes in the charges, but if substantial changes are required, will refer the matter to the convening authority. See 33*d*.

*d. **Trial procedure.***—(1) *Determining jurisdiction.*—After determining that the charges and other data are in proper form, the summary court should arrange for the presence of the accused. When the accused appears, the court should advise him of the following matters: The general nature of the charges; the fact that they have been referred to a summary court-martial for trial; who appointed the court; the name of the accuser; the names of the witnesses who will probably be called; the right of the accused to cross-examine them or have the court ask any questions which the accused desires answered; the right of the accused to call any witnesses or produce any evidence in his own behalf with the assurance that the court will assist him in every possible way to do so; his right to testify on the merits or to remain silent (148*e*; app. 8*a*; Art. 31) and, after any findings of guilty are announced, to make an unsworn statement in mitigation or extenuation of any offense of which he may be convicted (75*c*; app. 8*a*); the maximum sentence which the court can adjudge if the accused is found guilty of the offense or offenses charged.

If it does not appear that the accused has been permitted and has elected to refuse punishment under Article 15 for all the offenses charged, the summary court will advise him of his right to object to trial by summary court-martial (Art. 20) and will ask him whether he consents or objects to such trial. After giving the accused a reasonable time to consider the question, the summary court will record his response in the space provided on page 4 of the charge sheet.

If the accused objects to trial and it does not appear that he has been permitted and has elected to refuse punishment under Article 15 for all the offenses charged, the summary court will note such facts on page 4 of the charge sheet and will return the charges and allied papers to the convening authority.

If the accused consents to trial, or if he objects to trial and it appears that he has been permitted and has elected to refuse punishment under Article 15 for all the offenses alleged, the summary court will proceed with the trial.

(2) *Arraignment and pleas.*—After complying with the provisions of the preceding paragraph (79*d* (1)) and determining that it has jurisdiction over the accused, the summary court will read or show the charges and specifications to the accused. Any necessary explanation of the charges may be made. The accused should then be asked how he pleads to each specification and charge. If he pleads guilty to any specification or charge, the summary court will explain the ele-

ments of the offense to which he has pleaded guilty, will advise him that the court may find him guilty of such offense without considering further proof, and will inform him of the maximum sentence which the court can impose for any offense to which he has pleaded guilty.

If the accused desires to change his plea, or if the summary court is in doubt as to his understanding and desire to plead guilty, or if at any time during the trial the accused makes a statement, sworn or unsworn, inconsistent with his plea of guilty, a plea of not guilty will be entered. If a plea of guilty to all specifications and charges is allowed to stand, the court may proceed at once to find the accused guilty and to adjudge an appropriate sentence; however, the court may, in the interest of justice, proceed with the trial and consider evidence on the merits or in mitigation or extenuation. If, after hearing such evidence, the court believes the plea of guilty to have been improvidently entered, it shall enter a plea of not guilty and proceed as though the accused had pleaded not guilty. See 70 and Article 45.

(3) *Presentation of evidence.*—If the accused has pleaded not guilty or if, in the interest of justice following a plea of guilty, the court has determined to consider evidence on the merits or in extenuation or mitigation, arrangements will be made for the attendance of necessary witnesses. Witnesses (other than the accused) should be excluded from the courtroom until called to testify. Witnesses for the prosecution will be called first and examined under oath as to all matters relevant to the offense charged, whether on the merits or in extenuation or mitigation. The accused will be extended the right to cross-examine such witnesses. The summary court will aid the accused in the cross-examination, and, if the accused desires, will ask questions suggested by the accused. On behalf of the accused, the court will obtain the attendance of witnesses, administer the oath and examine them, and will obtain such other evidence as may tend to disprove or negative guilt of the charges, explain the acts or omissions charged, show extenuating circumstances, or establish grounds for mitigation. Before determining the findings, he will explain to the accused his right to testify on the merits or to remain silent, and will give the accused full opportunity to exercise his election. See appendix 8 for form of explanation.

(4) *Findings and sentence.*—The applicable principles stated in 74 and 76 should be considered by a summary court-martial in determining the findings and sentence, respectively. The court will announce the findings to the accused as soon as they are determined. If the accused has been found guilty of any offense, the summary court will advise him of his right to submit matter in extenuation or mitigation, including the making of an unsworn statement (75*c*; app. 8).

Before determining the sentence, the summary court will show or read to the accused any admissible evidence of previous convictions (75*b* (2)) and the personal data appearing on the first page of the charge sheet and will ask him whether they are correct. If the accused claims they are not correct in any particular, the court will determine the issue (75*b* (1), (2)). The court will advise the accused of the sentence as soon at it is determined. If the sentence includes confinement, the summary court will take such action as may be prescribed by the convening authority to have the accused delivered to an appropriate place of confinement.

e. ***Record.***—See appendix 11 for form of record of trial by summary court-martial. The charge sheet ordinarily will be received in triplicate by the summary court-martial. So much of the proceedings as relate to pleas, findings, and sentence must be recorded in the appropriate place on page 4 of all three copies of the charge sheet. The number of previous convictions considered and the fact that the accused was advised of the matters outlined in 79*d* will also be noted in the spaces provided on page 4 of all three copies of the charge sheet. Unless otherwise prescribed by the convening or higher authority, the evidence considered by the summary court-martial need not be summarized or attached to the record of trial. The summary court should, however, line out and initial the name or names of any witnesses who are listed on page 1 of the charge sheet but who were not called to testify. If the testimony of witnesses other than those listed was considered, the court should insert their names and addresses on all three copies of the charge sheet and note whether they testified for or against the accused. The summary court will authenticate the record by signing it in triplicate. He will forward all three copies and the accompanying papers without formal letter of transmittal to the convening authority. If the summary court is the only officer present with the command, the record will so state, and that officer thereafter holds the record as convening authority for purposes of review. For disposition of summary court-martial records, see 91*c*.

Chapter XV

PROCEDURAL ASPECTS OF REVISION PROCEEDINGS, REHEARINGS, AND NEW TRIALS

REVISION—REHEARINGS AND NEW TRIALS

80. **REVISION.**—*a.* ***General.***—The procedure of a general or special court-martial when reconvened for the purpose of revising its action or correcting its record will in general be as indicated by the form of record of proceedings in revision (app. 8*c*). See Article 62 for matters that cannot be reconsidered and 67*f* as to procedure in reconsideration of action on motions and similar matters. A certificate of correction may be used to make the record show the true proceedings. In this connection, see 86*c* (Correction of record).

b. ***Personnel.***—Proceedings in revision may be taken only by the members of the court who participated in the findings and sentence. Such proceedings may not be taken if the court has been dissolved. In this connection, see 37*c*(1). The law officer, the accused, and counsel for both sides must be present during the open sessions of the court in revision. The absence of a member of the court who participated in the findings and sentence does not invalidate the proceedings if a quorum is present (five for a general court-martial—three for a special court-martial). The same law officer and counsel who participated in the trial of the case should be present, but the legality of the proceedings will not be affected if a new law officer is properly appointed to the court, is sworn (opportunity to challenge him for cause having been given), and has familiarized himself with those portions of the record which are to be considered by the court in taking its action in revision. Similarly, the legality of the proceedings is not affected if a member of the prosecution or defense is present who was previously absent from, or who has been newly appointed to, the court, provided he has the requisite legal qualifications and is sworn.

c. ***Procedure.***—In cases in which the court has not reconvened on its own motion, the trial counsel will read in open court the communication from the convening authority returning the record and directing the reconvening. If a general court-martial has any doubt as to the action which it may take, the law officer should be requested to give it additional instructions. If a special court-martial has any doubt as to its action in such a case, it may direct the trial counsel to produce such legal authority and other information as may be necessary. Such instructions will be given in open court and will be made a matter of record. The court will then close, consider, and determine the appropriate action to be taken on the matter before it. As soon as it has determined its action, the court will open and announce such action in the presence of the law officer, the accused, and counsel for both sides. In this connection, see 74*f* (Form of findings). It will then adjourn.

As the action which may be taken is entirely corrective, a case will not be reopened by the calling or recalling of witnesses or otherwise. The law officer (trial counsel of a special court-martial) may invite the attention of the court to any ambiguous or apparently illegal action taken by it.

d. ***Record.***—All proceedings in open court will be in the presence of the law officer, the accused, and counsel for both sides, and will be made a matter of record which will be authenticated in the manner prescribed for the original record. No physical change will be made in the original record. Amendments to the original appointing order detailing a new law officer or counsel will be incorporated in the record of revision. See 82*b* (Contents of record) and appendices 8*c* (Revision procedure) and 9*b* (Authentication of record).

e. ***Revision action by summary court-martial.***—What has been said with respect to the procedure in revision by general or special courts-martial will, so far as applicable, govern such procedure by summary court-martial.

81. REHEARINGS AND NEW TRIALS.—*a*. ***Related provisions.***—See 92 (Ordering rehearing), 94*a* (2) (Review of records of trial pursuant to Article 65*c*), 109 and 110 (New trial), 145*b* (Former testimony), Articles 63, 66*d*, and 67*e* (Rehearings), and Article 73 (New trial).

b. ***Procedure.***—The procedure in rehearings and new trials in general is the same as in other trials.

c. ***Examination of record of former proceedings.***—No member of a general or special court-martial upon a rehearing or upon a new trial should be permitted to examine the record of the former proceedings or any document (other than the charges) referred with the charges to the trial counsel, except when received in evidence at the rehearing or new trial. However, the law officer (president of a special court-martial) may examine that part of the record of any prior proceedings which relates to errors committed at the former proceedings when necessary to enable him to decide upon the admissibility of offered evidence or other questions of law involved. In this connection, see the seventh subparagraph of 92. Such part of the record may be read to the court when necessary for it to pass upon a ruling made subject to objection by any member under Article 51*b*. See 57 and 67*f*.

d. ***Sentence.***—Before a court-martial retires to determine a sentence upon a rehearing or new trial, the trial counsel should advise the court of the sentence adjudged upon the original trial and invite the attention of the court to any pertinent limitations upon its discretion in adjudging a new sentence. See Article 63*b* with respect to such limitations in rehearings and 109*g* (2) with respect to new trials. If the accused is found guilty upon any charge and specification upon a new trial under Article 73 or a rehearing the court will, subject to such pertinent limitations, adjudge an appropriate sentence (76*a*) without regard to any credit to which the accused may be entitled by virtue of the prior execution of any part of the sentence. However, upon a new trial ordered pursuant to section 12, act of 5 May 1950 (64 Stat. 147; 50 U. S. C. 740), the court may consider the executed portion of the prior sentence as a matter in mitigation. See 89*c* (7) (Action on rehearings) for the action of the convening authority with respect to the sentence adjudged on a rehearing. See 109*h* and 110*i* for such action on the sentence adjudged upon a new trial.

Chapter XVI

RECORDS OF TRIAL

GENERAL COURTS-MARTIAL—INFERIOR COURTS-MARTIAL

82. GENERAL COURTS-MARTIAL.—*a.* ***Responsibility for preparation.***—Each general court-martial shall keep a separate record of the proceedings of the trial of each case brought before it. The record is prepared by the trial counsel under the direction of the court, but the persons authenticating the record are responsible for its accuracy. See Articles 38*a* and 54*a*. It is immaterial to the sufficiency of a record whether it was kept or written by the trial counsel or by a reporter acting under his direction.

If practicable, the trial counsel will retain or cause to be retained any notes (stenographic or otherwise) or any mechanical or voice recording devices from which the record of trial was prepared for at least 30 days after delivery of a copy of the record to the accused or 60 days after the record of trial is forwarded to the convening authority, whichever period expires first.

b. ***Contents.***—(1) *General.*—The record of the proceedings in each case will be separate and complete in itself and independent of any other document. The record will show all the essential jurisdictional facts. It will set forth a verbatim transcript of all proceedings had in the open sessions of the court and any consultation between the court and the law officer in closed sessions with respect to the form of the findings. See 74*f* (1) and Article 39. If testimony is given through an interpreter, the record will so state. The record will set forth material conclusions arrived at by the members of the court in closed session. When a trial is terminated prior to findings or sentence, the record of trial will show the proceedings up to the time of such termination. For details of contents and certain exceptions to the foregoing rules, see appendix 9.

(2) *Striking matter from the record.*—Although not considered by the court as evidence, any remarks or testimony ordered stricken will nevertheless be fully recorded.

(3) *Record of revision proceedings.*—When a record is amended in revision proceedings, the record of the proceedings in revision will show specifically, ordinarily by page and line, the part of the original record that is changed and the changes made; in such a case, no physical change will be made in the original record. See 80*d* and appendix 8*c*.

(4) *Arguments.*—The court will take necessary action to insure that all oral arguments and statements of counsel made in open court are set forth verbatim in the record. Thus, if the speed of an oral argument is such that the reporter is unable to record it verbatim, the court should direct counsel either to reduce the speed of his argument or to submit the argument in writing. A written argument or statement of counsel is ordinarily read to the court by the party submitting it; it is thereafter attached to the record as an exhibit for that party.

(5) *Appendages.*—Accompanying the original record—securely bound together—will be the original charge sheet and, if not used as exhibits or properly disposed of otherwise, the other papers which accompanied the charges when referred for trial, including the report of investigation under Article 32 and, if the trial was a rehearing or a new trial, the record of the former hearing or hearings.

The following matters will, in an appropriate case, be bound into the record immediately following the exhibits: Recommendations and other papers relative to clemency (77*a*); proffered exhibits which were excluded as not admissible in evidence (54*d*); proceedings held outside of the presence of members of a general court-martial (57*g* (2)); proposed instructions and any arguments made thereon (73*c* (2)); the certificate of a medical officer as to the physical condition of an accused who has been sentenced to confinement on diminished rations or on bread and water (125).

Copies of vouchers for the payment of reporters or witnesses need not be attached to the record.

c. ***Copies.***—For instructions as to the preparation of copies of the record, see 49*b* (2) and appendix 9*f*. All copies of the record except those delivered to the accused will be attached to the original record of trial when it is forwarded to the convening authority.

d. ***Security classification.***—When the record contains information which is required to be classified by the security regulations of the armed force concerned, the trial counsel will take appropriate action in accordance with the pertinent regulations of the Department concerned to assign a proper security classification to the record. However, convening authorities, staff judge advocates, and legal officers will be on the alert to downgrade or declassify a record of trial which does not contain data requiring *security* protection. If the papers accompanying the record of trial include classified matter which is not material to the inquiry, such matter should be withdrawn from the papers to be bound with the record if the withdrawal will permit downgrading or declassification of the record. If the accompanying papers include classified matter which is material to the inquiry, action should be taken to have such matter declassified or downgraded, if possible, if the action will permit downgrading or declassification of the record.

e. ***Correction of record.***—After the record has been transcribed, but before it is authenticated, the trial counsel should examine it carefully for errors or omissions. If any are discovered, he should make and initial such changes as are necessary to make the record show the true proceedings. If major corrections are necessary, he should direct the reporter to rewrite the record or the part of it that is defective. Changes may not be made by the trial counsel after the record is authenticated.

When undue delay will not result, the trial counsel should permit the defense counsel to examine the record before it is forwarded to the convening authority. A suitable notation that this examination has been accomplished by the defense counsel should be included in the record, preferably on the page bearing the authentication. See appendix 9*c* for form. If the defense counsel discovers errors or omissions in the record, he should suggest to the trial counsel appropriate changes to make the record show the true proceedings. If the trial counsel does not concur with the defense counsel as to a suggested change, or if the record has already been authenticated, the trial counsel should invite such suggestions to the attention of those who authenticate the record.

At any time before the record is forwarded to the convening authority, the persons who authenticate the record may change it to make it show the true proceedings. Such changes, as well as any changes made by the trial counsel, should be initialed by the persons who authenticate the record.

f. ***Authentication.***—The record in each case shall be authenticated by the president (senior member) and law officer who were actually present at the conclusion of the proceedings. If, after trial, either of the persons who served in those capacities is unable to authenticate because of death, disability, or absence, the record will be signed by a member of the court who was present at the conclusion of the proceedings. If both the persons who served in those capacities are unable to authenticate because of death, disability, or absence, the record will be signed by two members of the court who were present at the conclusion of the proceedings. When some one other than the president or law officer authenticates, the reason will be stated. See appendix 9*b* for forms of authentication.

g. ***Disposition.***—(1) *Delivery to accused.*—Subject to the exceptions noted below with respect to security matters, the trial counsel will give the accused a copy of the record and all documentary exhibits received in evidence as soon as the record is authenticated. See

54*d*, 143*a* (2), appendix 9*f*, and Article 54*c*. The receipt of the accused for the copy of the record furnished him will be attached to the original record of trial. If it is impracticable to secure a receipt from the accused before the original record is forwarded to the convening authority, the trial counsel will attach to the original record a certificate to the effect that a copy of the record has been transmitted to the accused—giving the means of transmission and the addressee. In such a case, the receipt of the accused will be forwarded to the convening authority as soon as it is obtained.

The accused is also entitled to an authenticated copy of a record in revision to the same extent that he is to a copy of the original proceedings.

If the copy of the record prepared for the accused contains matter requiring security protection, the trial counsel, unless otherwise directed by the convening authority, will forward the accused's copy to the convening authority. The latter will excise or withdraw from the accused's copy any matter requiring security protection (82*d*) and will, thereafter, cause the expurgated copy to be delivered to the accused together with a certificate to the effect that certain matter has been deleted or withdrawn from the accused's copy of the record for reasons of national security, and that the original record of trial may be inspected in the files of the Judge Advocate General of the appropriate Department under such regulations as may be prescribed by the Secretary of the Department. The certificate will list:

(*a*) The pages from which matter has been deleted;
(*b*) The pages which have been removed in their entirety; and
(*c*) The exhibits which have been withdrawn.

A copy of this certificate, together with a statement signed by the accused acknowledging receipt of an expurgated copy of the record of trial, or a certificate of delivery of same, shall be attached to the original record of trial.

(2) *Forwarding to convening authority.*—The original record and accompanying papers, including a properly executed Court-Martial Data Sheet and all copies of the record not delivered to the accused, will be forwarded by the trial counsel to the headquarters of the convening authority or to his successor in command, or, in the case of a court appointed by the President of the United States or the Secretary of a Department, to the Judge Advocate General of the Department concerned. See Articles 17*b* and 60.

h. ***Loss of record.***—When a record of trial is lost or destroyed, a new record will be prepared if practicable and will become the record of trial in the case. The new record will, however, be prepared only when the available original notes or other sources are such as to enable the preparation of a complete and substantially accurate record of the case. In any case of loss of a record prior to action by the convening authority, the trial counsel or other proper person will fully inform the convening authority as to the facts and as to the action, if any, taken.

i. ***Loss of notes or devices containing original record of proceedings.***—If the notes or devices by means of which the proceedings in court were recorded are lost before the record of trial has been prepared, the convening authority will be fully informed of the facts. Thereafter, unless the convening authority directs otherwise, a record of trial will be prepared following, as nearly as practicable, the form of record prescribed in appendices 8 and 9. The record will be authenticated and disposed of as provided in 82*f* and *g*. The fact that such a record does not contain a verbatim transcript of all the proceedings may deprive the accused of his right under the code to a full appellate review of his case and, thus, be a proper reason for disapproving any sentence adjudged, but it shall not preclude the convening authority from ordering a rehearing as to any offense of which the accused was found guilty if the finding is supported by the summary of the evidence contained in the record. In this connection, see 92.

83. INFERIOR COURTS-MARTIAL.—*a.* ***Special court-martial records involving bad conduct discharge.***—Subject to the exceptions set forth in appendices 8 and 9, a record of trial by special court-martial in which a bad conduct discharge is adjudged will contain a verbatim transcript of all proceedings in open court. It will follow the form in appendix 9 and will be prepared and disposed of in accordance with the rules prescribed in 82 for a record of trial by general court-martial. As to authentication, see 83*c* and appendix 9*b* (2).

b. ***Special court-martial records not involving bad conduct discharge.***—(1) *General rules.*—Except as otherwise indicated in 83*b* and *c* and appendix 10, the provisions of 82 will serve as a useful guide in the preparation of a record of trial by special court-martial in which a summarized report of the proceedings is made.

(2) *Contents.*—When a bad conduct discharge is not adjudged, a record of trial by special court-martial need contain only a summarized report of the testimony, objections, and other proceedings as indicated in appendix 10. However, in such a case, if a reporter was appointed and actually served in that capacity throughout the trial, the convening or higher authority may direct that the proceedings be reported verbatim as prescribed by 83*a* and appendices 8 and 9. The notes or devices by means of which the original proceedings were

recorded need not be retained after the record of trial has been authenticated.

(3) *Preparation.*—It is immaterial to the sufficiency of a record whether it was kept or written by the trial counsel or by one of his assistants, a clerk, or a reporter acting under his direction.

(4) *Copies.*—Unless otherwise directed by the convening authority, the trial counsel will prepare or cause to be prepared an original of each record and of all documentary exhibits received in evidence and copies of each record and of all documentary exhibits equal to the number of accused tried. However, if the case involves a general or flag officer, two additional copies of the record must be prepared. See 49*b* (2) and appendices 9*f* and 10*c*.

c. ***Authentication.***—The record of trial in each case tried by special court-martial shall be authenticated by the signature of the president (senior member) and the trial counsel (senior member of the prosecution) present at the conclusion of the proceedings. If, after trial, either of the persons who served in those capacities is unable to authenticate because of death, disability, or absence, the record will be signed by another member (who was present at the conclusion of the proceedings) in lieu of the president, and by an assistant trial counsel (who was present at the conclusion of the proceedings) in lieu of the trial counsel. If, because of death, disability, or absence, no member of the prosecution is able to authenticate the record, it shall be authenticated for the trial counsel by a member of the court who was present at the conclusion of the proceedings. When someone other than the president or the senior trial counsel authenticates, the reason will be stated. See appendix 9*b* (2) for forms of authentication.

d. ***Disposition.***—The provisions of 82*g* for the disposition of records of trial by general courts-martial are applicable also to records of trial by special courts-martial.

e. ***Summary courts-martial.***—For the preparation, authentication, and disposition of records of trial by summary courts-martial, see 79*e*.

Chapter XVII

INITIAL REVIEW OF AND ACTION ON RECORDS OF TRIAL

WHO MAY TAKE INITIAL ACTION—REFERENCE TO STAFF JUDGE ADVOCATE OR LEGAL OFFICER—MISCELLANEOUS POWERS AND DUTIES OF THE CONVENING AUTHORITY—EXAMINATION OF FINDINGS OF GUILTY—POWERS OF THE CONVENING AUTHORITY WITH RESPECT TO THE SENTENCE—FORMS OF ACTION AND RELATED MATTERS—ORDERS AND RELATED MATTERS—DISPOSITION OF THE RECORD AND RELATED MATTERS

84. WHO MAY TAKE INITIAL ACTION.—*a. **General.***—After every trial by court-martial, including rehearings and new trials, the record shall be forwarded to the convening authority for initial review and action. As used in this chapter, the term "convening authority" shall be understood to include the officer who convened the court, an officer commanding for the time being, a successor in command, or any officer exercising general court-martial jurisdiction. See Article 60. The convening authority cannot delegate his functions as such to anyone. The fact that the accused is not a member of, or is not present in, the command of the convening authority does not divest the latter of his right to take initial action on the record of trial.

*b. **Normal convening authority.***—The officer who convened the court-martial which adjudged the sentence in a particular case is normally the convening authority who takes initial action on the record of trial of that case. The power of an officer to take initial action as convening authority on a record of trial vests in the office, not in the person, of the authority so acting. Thus, when an assigned commander is not present for duty with his command because of illness, leave, or for any other cause, the officer temporarily succeeding to command during such absence is, within the meaning of Article 60, the officer commanding for the time being and, as such, is authorized to take initial action as convening authority on a record of trial of a court appointed by the assigned commander. Similarly, if an officer has assumed permanently the command functions of a predecessor by reason of assignment, absorption of one command by another, or otherwise, he is, within the meaning of Article 60, a successor in command and, as such, is authorized to take initial action as convening authority on a record of trial of a court appointed by his predecessor.

*c. **Officer exercising general court-martial jurisdiction.***—When it is impracticable for the officer who convened the court, the officer commanding for the time being, or a successor in command to take initial action upon a record of trial, such action may be taken by any officer exercising general court-martial jurisdiction. For example, in a case in which a command has been inactivated or has been alerted for immediate overseas movement, action upon a sentence adjudged by a court-martial appointed by the commander prior to such inactivation or movement may be taken by any officer exercising general court-martial jurisdiction. Similar action would be appropriate if an officer who sat as a member of the court which adjudged the sentence became the commander for the time being or a successor in command. In such a case, the normal convening authority will forward the record of trial—ordinarily through the chain of command—to an officer authorized to exercise general court-martial jurisdiction. For purposes of regularity, the record should be forwarded by a letter of transmittal containing a statement of the reasons for the failure of the normal convening authority to act on the record.

d. ***Action when a bad conduct discharge is adjudged by a special court-martial.***—Ordinarily, action upon a record of trial is taken by only one convening authority. When, however, the convening authority who has approved a sentence of bad conduct discharge adjudged by a special court-martial does not exercise general court-martial jurisdiction, and has not been authorized to forward such a record directly to the appropriate Judge Advocate General for action (94*a* (3)), the officer exercising general court-martial jurisdiction over the command within which the accused was tried by special court-martial also reviews and takes action upon the record in the same manner as on a record of trial by general court-martial. See Article 65*b*. In such a case, the officer exercising general court-martial jurisdiction shall act only with respect to the findings and sentence as approved by the convening authority. As to the vacation of a suspended sentence, see 97*b*.

85. REFERENCE TO STAFF JUDGE ADVOCATE OR LEGAL OFFICER.—*a.* ***General.***—Before acting upon a record of trial by general court-martial, or a record of trial by special court-martial which involves a sentence of bad conduct discharge, a convening authority who exercises general court-martial jurisdiction will refer it to his staff judge advocate or legal officer for review and advice. See Articles 61 and 65*b*.

No person who has acted as member, law officer, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act as a staff judge advocate or legal officer to any reviewing (convening) authority upon the same case (Art. 6*c*).

If a convening authority has no staff judge advocate or legal officer, or if the person serving in that capacity is ineligible to act as staff judge advocate or legal officer for any reason (e.g., Art. 6*c*), he may request the assignment of a staff judge advocate or legal officer to review the record, he may forward the record to the appropriate Judge Advocate General for review and advice before acting thereon, or he may forward the record for action to an officer exercising general court-martial jurisdiction as provided in 84*c*.

b. ***Form and content of review.***—The staff judge advocate or legal officer to whom a record of trial is referred for review and advice will submit a written review thereof to the convening authority. The review will include a summary of the evidence in the case, his opinion as to the adequacy and weight of the evidence and the effect of any error or irregularity respecting the proceedings, and a specific recommendation as to the action to be taken. Reasons for both the opinion and the recommendation will be stated. The convening authority may direct his staff judge advocate or legal officer to make a more comprehensive written review or supplementary oral or written reviews or reports.

If the final action of the court has resulted in an acquittal of all charges and specifications, the review shall be limited to questions of jurisdiction (Art. 61).

c. ***Disagreement between convening authority and staff judge advocate or legal officer.***—Ordinarily, the convening authority should accept the opinion of his staff judge advocate or legal officer as to the effect of any error or irregularity respecting the proceedings, as to the adequacy of the evidence, and as to what sentence can legally be approved. However, it is within the particular province of the convening authority to weigh evidence, judge the credibility of witnesses, determine controverted questions of fact that may have been raised in the record, and to determine what legal sentence should be approved. In those unusual cases in which a convening authority is in disagreement with his staff judge advocate or legal officer as to the effect of any error or irregularity respecting the proceedings, as to the adequacy of the evidence, or as to what sentence can legally be approved, the convening authority may transmit the record of trial, with an expression of his own views and the opinion of his staff judge advocate or legal officer, to the Judge Advocate General of the armed force concerned for advice. In any case which is forwarded to the Judge Advocate General, if the convening authority takes an action different from that recommended by his staff judge advocate or legal officer, he should state the reasons for his action in a letter transmitting the record to the Judge Advocate General (91*a*).

*d. **Disposition of review.***—Two signed copies of the review of the staff judge advocate or legal officer will be attached to the original record of trial if the record is forwarded to the appropriate Judge Advocate General. In the interest of instruction in the administration of justice, copies of the review customarily are made available to the trial counsel and law officer who participated in the trial of the case. Similarly, in a case involving a bad conduct discharge adjudged by a special court-martial, a copy is ordinarily transmitted to the convening authority.

86. MISCELLANEOUS POWERS AND DUTIES OF THE CONVENING AUTHORITY.—*a. **General.***—Express approval of a sentence by a convening authority is an action which must precede the execution of the sentence (Arts. 60, 61, 64, 65, 71*d*). Express approval of the findings is unnecessary and, in the absence of express approval of the sentence, is not sufficient to give the sentence legal effect. In acting on the findings and sentence of a court-martial, the convening authority shall approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in his discretion determines should be approved. Unless he indicates otherwise, approval of any part of the sentence shall constitute approval of the findings of guilty. See Article 64.

Unless the convening authority indicates otherwise, disapproval of the entire sentence constitutes disapproval of all findings of guilty. If he disapproves the findings and sentence of a court-martial, he may, except when there is lack of sufficient evidence in the record to support the findings, order a rehearing. In this connection, see 92 and Article 63.

*b. **Matters to be considered on review.***—(1) *When proceedings resulted in a sentence.*—Before he may approve a finding of guilty of an offense or the sentence adjudged therefor, the convening authority must determine:

(*a*) That the court was legally constituted throughout the trial (chs. II, III) and had jurisdiction over the offense (87*a* (2)) and the person tried (ch. IV);

(*b*) That the accused had the requisite mental capacity at the time of trial and the requisite mental responsibility at the time of the commission of the offense (ch. XXIV, especially 124);

(*c*) That the competent evidence of record (87*a* (3); ch. XXVII) established each element of the offense of which the accused was found guilty (ch. XXVIII);

(*d*) That the sentence was within the power of the court to adjudge (ch. IV) and within the prescribed limitations on punishments (109*g* (2); Art. 63*b*; ch. XXV);

(*e*) That there were no errors which materially prejudiced the substantial rights of the accused (87*c*).

(2) *Finding of not guilty or ruling amounting to finding of not guilty.*—Neither a finding of not guilty nor a ruling of the court which amounts to a finding of not guilty requires any action by the convening authority thereon. The latter should neither approve nor disapprove the action of the court in such a case. Disapproval cannot in any event affect the finality of a legal acquittal or a ruling of the court that amounts to a legal acquittal. The record of trial in a case involving an acquittal of all charges and specifications should be examined, however, to determine whether the court was properly constituted and had jurisdiction over the accused and the offense tried. A similar examination should be made with respect to findings of not guilty of some, but not all, of the specifications upon which the accused was tried. In this connection, see 87*a* (2), 89*c* (1), and 92. Such a record may also show that administrative action is appropriate. For example, if the court acquitted the accused of all charges and specifications because of his lack of mental responsibility at the time of the offense (120*b*), the disposition of the accused will be in accordance with pertinent departmental regulations.

No action can be taken by the convening authority that would amount to censure of the court or the members thereof. See Article 37.

For action when the convening authority differs with the court with respect to a ruling which does not amount to an acquittal, see 67*f*.

c. ***Correction of record.***—A record of trial may upon review be found to be incomplete or defective in some material respect, as, for example, when it fails to show that the members of the court were sworn, or that the required number of members concurred in the vote on the findings or sentence. The court may have performed its duty properly but through clerical error or inadvertence the events may have been improperly recorded. In such a case, the record must be corrected to make it show the true proceedings. It may be returned to the president of a general or special court-martial or to the summary court-martial for a certificate of correction to relate the true facts. The certificate will be authenticated in the same manner as the record of trial. See 82*f*, 83*c*, and 79*e*. In general and special court-martial cases, the authenticated certificate will be attached to the record of trial after the original signatures authenticating the record. Except in the case of a summary court-martial, the accused will be furnished a copy of the certificate of correction, and his receipt will be obtained and attached to the record of trial. See 82*g* (1) and appendix 9. A copy of the certificate will be attached to all other copies of the record which were prepared. See 79*e* and appendices 9*f* and 10*c*. A certificate of correction may be used only to make the record correspond to that which actually occurred at the trial. If the court was not sworn, for example, the error cannot be cured by a certificate of correction.

d. ***Revision proceedings.***—For procedure in revision, see 80. When there is an apparent error or omission in the record, or when the record shows improper or inconsistent action by a court-martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action (Art. 62*b*). For example, if a previous conviction was erroneously considered by the court, and it is believed that the consideration of such conviction influenced the court in adjudging the sentence, or if the sentence adjudged is less than the mandatory sentence for the offense, the convening authority may return the record to the court to reconsider the matter and revise its proceedings accordingly. In such a case, the record is ordinarily transmitted to the trial counsel of a general or special court-martial or to the summary court-martial by a written communication pointing out the apparent defect in the record and directing the reconvening of the court for the purpose of reconsideration and revision of its proceedings. See Article 62*b* as to matters that cannot be reconsidered. Except for the purpose of making the record show the true proceedings and the exceptions stated in Article 62*b* (2) and (3), proceedings in revision may not be had in any case in which any part of the sentence has been ordered executed.

e. ***Action when insanity indicated.***—For action to be taken by the convening authority when it appears from the record or from any other source that the accused may have been insane at the time of the commission of the offense or at the time of trial, regardless of whether such question was raised at the trial or how it was determined if raised, see 124.

87. EXAMINATION OF FINDINGS OF GUILTY.—*a.* ***Findings as to a specification.***—(1) *General.*—In considering the legality of a finding of guilty of a specification, the convening authority will be guided by the principles stated in 74*a* and *b*.

(2) *Legal sufficiency of the specification.*—If a specification of which the accused has been found guilty fails to allege any offense, the

proceedings as to that specification are a nullity and will be declared invalid (86*b* (2), 89*c* (1), 92; app. 14, form 25). The proceedings as to a specification should not be held invalid solely because the specification is defective unless it appears from the record that the accused was in fact misled by such defect or that his substantial rights were in fact otherwise materially prejudiced thereby. The test of the sufficiency of a specification is not whether it could have been made more definite and certain, but whether the facts alleged therein and reasonably implied therefrom set forth the offense sought to be charged with sufficient particularity to apprise the accused of what he must defend against, and whether the record is sufficient to enable him to avoid a second prosecution for the same offense. In this connection, see 28, 69*b*, and appendix 6.

(3) *Sufficiency of the evidence.*—In the course of taking action upon a record of trial, the convening authority is empowered to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. In considering the evidence, he will be guided by the principles stated in 74*a* and chapter XXVII. Unless he determines that a finding of guilty was established beyond a reasonable doubt by the competent evidence of record, he should disapprove the finding.

(4) *Lesser included offense.*—When the evidence, although legally insufficient to establish guilt of the accused as to the offense of which he was found guilty, is sufficient to support a finding of guilty of a lesser included offense, the convening authority may approve so much of the finding of guilty as involves a finding of guilty of the lesser included offense. In this connection, see 158, appendices 12 and 14*b* (forms 14–17), and Article 59*b*. In approving only so much of a finding of guilty as involves a lesser included offense, all elements of the offense intended to be approved should be clearly indicated in the statement of approval.

b. ***Consideration of the findings as to the charge.***—Although the criminal liability of the accused is, in general, determined by the finding as to the specification, there should be a consistent finding as to the charge under which the specification is laid. If the finding as to a specification is not consistent with the finding as to the charge, and the inconsistency raises a reasonable doubt as to the intent of the court (e. g., when the court finds the accused guilty of a proper specification, but finds him not guilty of, or makes no findings as to, the charge under which it is laid), the convening authority should return the record to the court for reconsideration and revision. However, if the inconsistency leaves no doubt as to the intent of the court, it may be corrected by the convening authority in his action. For example, when, in a trial for desertion in violation of Article 85, the court finds the accused guilty only of absence without leave, but finds such offense to be a violation of Article 85 instead of Article 86, the convening authority may correct the inconsistency by approving only so much of the finding of guilty of the specification and charge as involves a finding of guilty of the specification in violation of Article 86.

c. ***Effect of errors on the findings.***—Although the competent evidence of record may be sufficient to establish the guilt of the accused as to a particular offense, the convening authority may not approve a finding of guilty if, as a result of an error concerning the admission of incompetent evidence prejudicial to the accused or the rejection of competent evidence favorable to the accused, or any matter of procedure affecting a finding of guilty of an offense, the substantial rights of the accused are materially prejudiced. See Article 59. For example, when a court-martial finds the accused guilty of a lesser included offense to which he entered no plea, and it appears from the record that trial of such offense is barred by Article 43 and that the court failed to advise the accused of his right to avail himself of the provisions of Article 43 in bar of punishment, the convening authority will disapprove the finding or any separable part of it that involves a finding of guilty of an offense the trial of which is barred by the provisions of Article 43. In this connection, see 68*c*.

Article 59, taken together with Article 64, vests a sound legal discretion in the convening authority to the end that substantial justice may be done. The effect of a particular error within the purview of Article 59 should be weighed by him in the light of all the facts as shown by the record and, unless it appears to him that the substantial rights of the accused were materially prejudiced, he should disregard the error as a basis for concluding that the findings of guilty of a particular offense should be disapproved.

In general, the convening authority may disregard an error if he is convinced that the error did not influence, or had but slight effect upon, the decision of the court. The inquiry cannot be merely whether there was enough competent evidence to support the result apart from the phase affected by the error. The test to be applied in determining whether an error materially prejudiced the substantial rights of the accused is this: An error prejudicial to the rights of the accused must be held to require the disapproval of a finding of guilty of an offense, or the part thereof, to which it relates unless the competent evidence of record is of such quantity and quality that a court of reasonable and conscientious men would have made the same finding had the error not been committed.

Regardless, however, of the test in the subparagraph above, if the error is such a flagrant violation of a fundamental right of the accused as to amount to a denial of due process (e. g., when the disloyalty of defense counsel directly aids the prosecution) the finding must be disapproved regardless of the compelling nature of the competent evidence of record.

If the court lacked jurisdiction as to some of the offenses for which the accused was tried, the proceedings as to the other offenses tried are not invalid for that reason.

88. POWERS OF THE CONVENING AUTHORITY WITH RESPECT TO THE SENTENCE.—*a. General.*—Neither the convening authority nor any other officer is authorized to add to the punishment imposed by a court-martial. A sentence adjudged by the court may be approved if it was within the jurisdiction of the court to adjudge and it does not exceed the maximum limits prescribed by the President under Article 56 (ch. XXV) for the offenses of which the accused legally has been found guilty. When a sentence in excess of the legal limits is divisible, such part as is legal may be approved. See 125 for limitations upon approval of a sentence which includes confinement on bread and water. See 109*g* (2) for limitations upon punishments adjudged at a new trial and Article 63*b* for limitations upon punishments adjudged at a rehearing. With respect to action on a rehearing, see also 89*c* (7).

The disapproval of a sentence nullifies it as a basis for punishment; affirmation of a disapproval is not required. For limitations upon ordering a rehearing after disapproval of a sentence, see 92. An approval or a disapproval of a sentence should be express and explicit and should not be left to implication. For example, in approving "only so much" of a sentence as involves a mitigated sentence, the entire sentence intended to be approved should be set forth clearly in the statement of approval.

b. Determining what sentence should be approved.—In determining what sentence, or part thereof, should be approved, the convening authority will be guided by the principles stated in 76. The sentence approved should be that which is warranted by the circumstances of the offense and the previous record of the accused. Appropriate action should be taken to approve a less severe sentence when the sentence, though legal, appears unnecessarily severe. In approving severe sentences, consideration should be given to all factors, including the possibility of rehabilitation as well as the possible deterrent effect.

The convening authority may properly consider as a basis for approving only a part of a legal sentence not only matters relating solely to clemency, such as long confinement pending trial or the fact that, as an accomplice, the accused testified for the prosecution, but any other pertinent factors.

c. ***Approval of a part of a sentence.***—See 105*a* and Article 71 as to commutation. The convening authority may, subject to the limitations in 88*a*, approve a part of a sentence adjudged by a court-martial, but unless he is empowered to commute a sentence, that is, to change the nature of the punishment, the sentence approved by him must be included in the sentence adjudged by the court and must be one that the court might have imposed in the case. However, when a court has adjudged a mandatory sentence to imprisonment for life (Art. 118 (1) and (4)), the convening authority may approve any sentence included in that adjudged by the court.

In determining whether the part of the sentence to be approved is one that legally could have been adjudged by the court, the convening authority will be guided by the applicable rules in chapter XXV. For example, a sentence as approved may not provide for confinement of an enlisted person for more than six months without dishonorable or bad conduct discharge; nor may it provide for restriction in excess of two months, or hard labor without confinement for more than three months.

A sentence is included in the sentence adjudged by the court if it amounts to a mitigation of the sentence adjudged, that is, a reduction in quantity or quality, the general nature of the punishment remaining the same. Thus a sentence of dishonorable discharge may be mitigated to bad conduct discharge, but a bad conduct discharge may not be mitigated to any other punishment. Forfeiture of pay may be mitigated to detention of pay for a like period or less, within applicable legal limits; however, a fine may not be changed to a forfeiture, nor a forfeiture to a fine, as this action would constitute commutation. Confinement on bread and water may be mitigated to confinement at hard labor for a like period or less. Confinement at hard labor may be mitigated to hard labor without confinement for a like period or less, but within applicable legal limits. A sentence of dishonorable or bad conduct discharge, forfeiture of all pay and allowances, and confinement at hard labor for a definite period may be mitigated to a lesser punishment; for example, to confinement at hard labor for a period, within applicable legal limits, not exceeding that adjudged, and a forfeiture of not more than two-thirds of the enlisted person's pay per month for a definite period, within applicable legal limits.

In mitigating a sentence, the convening authority may, when appropriate, apportion an adjudged punishment among several less severe kinds of punishment of the same general nature. Although he may mitigate a punishment to a less severe kind of punishment (reduce it in quality), he may not increase it in quantity. Thus a sentence of confinement at hard labor for one month may not be mitigated to restriction for two months, or for any period in excess of one month; nor could it be mitigated to hard labor without confinement for one month and restriction for one month; however, it could be mitigated to hard labor without confinement for 15 days and restriction for 15 days.

d. ***Execution of sentence.***—Except in the case of a new trial (109 and 110), the convening authority may, at the time of approval of any sentence, order its execution if, as approved by him, it does not involve a general or flag officer, a sentence of death or dismissal, or an unsuspended sentence of dishonorable discharge, bad conduct discharge, or confinement for one year or more. See Article 71. Except in the case of a new trial, if the convening authority in his action approves but suspends the execution of that part of a sentence providing for dishonorable or bad conduct discharge, or confinement for one year or more, he may order all other parts of the sentence into execution unless any part thereof requires the approval of the President under Article 71*a* or the Secretary of a Department under Article 71*b*.

The authority ordering the execution of a sentence of death issues instructions concerning the time and place of execution, any designations or instructions in this particular matter by the court or the convening authority being disregarded.

e. ***Suspension of execution of sentence.***—(1) *General.*—See 97*b* for the procedure involved in the vacation of a suspension, and 97*a* for the general rules affecting suspensions.

At the time he approves a sentence, the convening authority may suspend the execution of all or any part of it except a sentence of death. Ordinarily, the purpose of suspending the execution of a sentence is to grant the accused a probationary period within which he may show by his conduct that he is entitled to have the suspended portion of the sentence remitted. The convening authority should suspend the whole of a sentence (except death) when it appears to him that such action will promote discipline and aid in the rehabilitation of the accused.

The convening authority should not suspend the execution of a punitive discharge or dismissal in a case involving conviction of an offense which shows that degree of moral turpitude which obviously disqualifies the accused for further military service.

A part of a sentence should not be suspended if it would be contrary to the customs of the service to execute the portion of the sentence that remains unsuspended. For example, with respect to a sentence of dishonorable or bad conduct discharge, forfeiture of all pay and allowances, and confinement at hard labor, it would be contrary to the customs of the service to suspend the execution of the punitive discharge and the confinement and order the total forfeitures into execution.

(2) *Types of suspensions.*—(*a*) *General.*—Except as otherwise provided in this paragraph (88*e*) or as may be provided by departmental regulations, the convening authority may, at the time he approves a sentence, suspend its execution for an indefinite period of time. Similarly, he may suspend its execution for a stated definite period of time if he provides in his action that unless the suspension is sooner vacated the expiration of the period of suspension shall operate as a complete remission of the suspended sentence. Such a provision shall not, however, prevent an earlier remission of the suspended sentence. In this connection, see 97*a*, 105*b*, and Article 74.

(*b*) *Suspending dishonorable or bad conduct discharge when sentence also includes confinement.*—If the approved sentence involves a dishonorable or bad conduct discharge and confinement, the convening authority may determine that the execution of the punitive discharge should be suspended to the end that the accused may have the opportunity of redeeming himself in the military service, but that the execution of the confinement should not be suspended. In such a case, he may suspend the execution of the punitive discharge until the release of the accused from confinement, or for a definite period thereafter, and provide in his action for the automatic remission of the suspended sentence as indicated in the preceding subparagraph. However, the convening authority may suspend the execution of the dishonorable or bad conduct discharge until the release of the accused from confinement without providing for an automatic remission of the suspended portion. In such a case, when the accused is released from confinement, the necessary administrative action may be taken to effect the punitive discharge without the publication of further court-martial orders and without a hearing under the provisions of Article 72. To avoid the possibility in such a case of the inadvertent execution of the punitive discharge prior to completion of appellate review, the action should provide for the suspension of the punitive discharge until the accused's release from confinement or the completion of appellate review, whichever occurs later. In this connection, see appendix 14 (forms 28 and 39). Suspension of the execution of a dishonorable or bad conduct discharge until the release of the accused from confinement will not prevent earlier action to vacate the suspension, to remit the punitive discharge, or to suspend it for an additional period (97*a*, *b*).

(*c*) *Suspending the execution of forfeiture.*—If a sentence includes a forfeiture of pay or allowances in addition to confinement not suspended, such forfeiture will apply to pay or allowances accruing to the accused on and after the date the convening authority approves such a sentence unless the convening authority, at the time he approves the sentence, suspends the execution of that portion of the sentence pertaining to forfeitures. See Article 57*a*. However, in a case involving an approved sentence of confinement and forfeiture of pay, if the convening authority does not desire to suspend the execution of the confinement or the forfeiture, but determines that the circumstances of the case warrant continuation of the accused in a pay status pending completion of appellate review, he may provide in his action that the application of the forfeiture shall be deferred until such time as the sentence as a whole is carried into execution. See appendix 14 (form 34).

When the approved sentence includes a forfeiture of pay or allowances in addition to confinement not suspended, the convening authority, unless he orders the execution, suspends the execution, or defers the applicability, of the forfeitures, should include in his action on the case a statement that the approved forfeiture will apply to pay or allowances accruing to the accused on and after the date of his action. See appendix 14 (form 34). This statement will aid disbursing and personnel officers in determining the effect of the approval by the convening authority of a sentence which includes a forfeiture of pay or allowances.

89. FORMS OF ACTION AND RELATED MATTERS.—*a.* ***General.***—The convening authority will state at the end of the record of trial in each case his decisions and orders. This requirement equally applies in summary court-martial cases, including those in which the convening authority is the officer that tried the case as summary court. See 5*c* and 79*e*. The action will be signed by the convening authority in his own hand. Below his signature will appear his rank and the fact that he is the commanding officer or other fact authorizing him to take the action. Appendix 14 contains forms of action of the convening authority. These forms, or a combination or modification of them, should be used whenever they are appropriate.

b. ***Modification of initial action.***—The convening authority may recall and modify any action taken by him at any time before it has been published or the accused has been officially notified thereof. When, as an incident of the review of a record of trial pursuant to Articles 65*b*, 66, or 67, or examination of a record of trial pursuant to Article 69, any incomplete, ambiguous, void, or inaccurate action of the convening authority is noted, such action will be modified by him in accordance with the advice or instructions of a higher reviewing authority or the Judge Advocate General. See 95. Any supplementary or corrective action taken by the convening authority shall be signed by the convening authority in his own hand.

c. ***Action on findings and sentence.***—(1) *General.*—If the court acquitted the accused of all charges and specifications, no action is required unless the proceedings are declared invalid because of a lack of jurisdiction or failure of the specifications, or any of them, to allege any offense cognizable by courts-martial. In this connection, see 86*b* (2), 87*a* (2), and 92.

(2) *Disapproval of sentence.*—As disapproval of the entire sentence, without mention of the findings, constitutes disapproval of all findings of guilty, the action in a case in which all the findings of guilty are to be disapproved ordinarily will not mention the findings. If the convening authority disapproves the sentence and does not order a rehearing, he will dismiss the charges. If a rehearing is ordered or if any finding is declared invalid because of the failure of a specification to allege any offense, the disapproval or the declaration of invalidity, together with the reasons therefor, will be set forth in the action. See 92. Similarly, if the reasons for the disapproval of a particular finding of guilty might aid in determining the effect of the proceedings upon future administrative disposition of the accused, the reasons for the disapproval should be set forth in the action. Such action would be appropriate, for example, when a finding of guilty is disapproved because of the insanity of the accused (124), or because trial of the offense was barred by the statute of limitations (68*c*; Art. 43), or if a finding of guilty of desertion is disapproved. The reasons for the disapproval of a finding of guilty may be set forth in any case.

(3) *Approval of sentence.*—When any part of the sentence is to be approved, mention will be made in the action only of those findings or parts of findings which are to be disapproved. See 89*c* (2) for rule as to stating reasons for disapproving a finding of guilty. Approval of the sentence, standing alone, constitutes approval of all findings of guilty.

(4) *Execution; suspension.*—A statement of the approval of all or a part of the sentence should be followed in the action by a statement, when appropriate, of whether, as approved, the sentence is to be executed or whether the execution of all or any part thereof is to be suspended. See appendix 14 for forms. The reasons for the approval, execution, or suspension of all or any part of a sentence need not be

stated in the action. See 88*e* (2) (*c*) for action to be taken when an approved sentence involves confinement unsuspended and forfeitures which are not ordered executed, suspended, or deferred.

When the convening authority is not empowered to commute a sentence, but feels that any approved sentence involving a general or flag officer, or extending to death or dismissal, should be commuted, he may make a recommendation to that effect in his action.

(5) *Place of confinement.*—If the convening authority orders a sentence of confinement at hard labor into execution, the place of confinement, as prescribed in pertinent departmental regulations, will be designated in his action. When a sentence of confinement is ordered into execution subsequent to the initial action of the convening authority, the authority ordering such execution will designate the place of confinement in the promulgating order. In this connection, see 93.

(6) *Temporary custody.*—When a record of trial involving an approved sentence is required to be forwarded to the appropriate Judge Advocate General (Art. 65*a*, *b*), the convening authority will, unless he orders any approved sentence of confinement into execution and designates a place of confinement, provide in his action for the temporary custody of the accused pending final disposition of the case upon appellate review. If practicable, the accused in such a case should be retained within the command of the officer exercising general court-martial jurisdiction over the accused until the sentence has become final after completion of any appellate review. See appendix 14 (form 34) for form of action and 96 for action to be taken in event the place of temporary custody (confinement) is changed prior to final disposition of the case upon appellate review.

(7) *Action on rehearing.*—The convening authority may approve a sentence adjudged upon a rehearing without regard to whether any portion or amount of the punishment adjudged at the former trial has been served or executed. However, in computing the term or amount of punishment actually to be served or executed under the new sentence, the accused will be credited with any portion or amount of the former sentence that was served or executed prior to the time it was disapproved or set aside. For example, if the original sentence consisted of confinement at hard labor for six months and forfeiture of $50 per month for six months, of which one month's confinement has been served (Art. 57*b*) but no forfeitures have been executed, and the sentence adjudged upon the rehearing is identical to that originally adjudged, the person charged with administrative execution of the new sentence would credit the accused with one month's confinement; the accused would have a balance of confinement for five months and forfeitures for six months yet to be executed. To insure that credit shall

be given in proper cases, the convening authority shall, if he approves any part of a sentence adjudged upon a rehearing, direct in his action that any portion or amount of the former sentence served or executed between the date it was adjudged and the date it was disapproved or set aside shall be credited to the accused. See appendix 14 (forms 18 and 38).

If, in his action on the record of a rehearing, the convening authority disapproves the findings of guilty of all charges and specifications which were tried at the former hearing and that part of the sentence which was based on such findings, he will, unless a further rehearing is ordered, provide in his action that all rights, privileges, and property affected by any executed portion of the sentence adjudged at the former hearing shall be restored. If the court, at a rehearing, acquits the accused of all charges and specifications which were tried at the former hearing, the promulgating order will provide for the restoration of all rights, privileges, and property affected by any executed portion of the sentence adjudged at the former hearing. See Article 75 and appendix 14 (forms 9 and 23).

(8) *Reprimand; admonition.*—Any reprimand or admonition provided for by the sentence of a general or special court-martial as ordered executed by the convening authority, will be included in his action. In those cases in which the execution of the sentence, including the reprimand or admonition, requires the approval of the President under Article 71*a* or the Secretary of a Department under Article 71*b*, a reprimand or admonition will not be set forth in the action of the convening authority and need not be set forth in the action of the President or Secretary, but it is included in the promulgating order directing the execution of the sentence.

90. ORDERS AND RELATED MATTERS.—*a.* ***General.***—An order promulgating the result of a trial by general or special court, and any action by the convening or higher authorities on the record of trial, although not necessary to the validity of the trial, will be issued whether such result was an acquittal or otherwise, and regardless of the action of the convening or higher authorities thereon. For forms of orders and data to be shown therein, see appendix 15 and pertinent regulations.

An order promulgating the proceedings and the initial action of the convening authority will bear the date of the action of the convening authority on the record of trial except when the order promulgating the result of a trial by special court-martial involving a bad conduct discharge is issued by the officer exercising general court-martial jurisdiction over the command (90*b* (1)). In the latter case, the order will bear the date such officer took action on the record of trial, but will recite in the body of the order the action of the convening authority and the date thereof.

An order promulgating an acquittal or action on the findings or sentence taken subsequent to the initial action of the convening authority will bear the date of its publication.

The promulgating order will state the date upon which the sentence was adjudged by the court or the date upon which the acquittal was announced.

b. ***By whom issued.***—(1) *Initial orders.*—The order promulgating the result of trial and the initial action of the convening authority will be issued by the convening authority in all cases except those in which a record of trial by special court-martial involving an approved bad conduct discharge is forwarded to the officer exercising general court-martial jurisdiction over the command under the provisions of Article 65*b*. In the latter case, the promulgating order will be issued by the officer exercising general court-martial jurisdiction who takes action on the record.

(2) *Orders issued subsequent to initial action of the convening authority.*—Action taken on the findings or sentence subsequent to the initial action thereon by the convening authority shall be promulgated, as may be appropriate under the circumstances, by the convening authority who took the initial action in the case, the commanding officer of the accused who is authorized to take the action being promulgated, an officer exercising general court-martial jurisdiction over the accused at the time of the action, or by the Secretary of the Department. In connection with action taken subsequent to the initial action of the convening authority, see 94 (Review of sentences of special and summary courts-martial), 95 (Correction of records of trial subject to appellate review), 97*a* (Remission and suspension), 97*b* (Vacation of suspension), 100*b* (Action when sentence set aside), 100*c* (Action when sentence is affirmed in whole or in part), 107 (Court-martial orders), 109*k* (New trial; court-martial orders).

c. ***Orders containing classified information or matter unfit for publication.***—When an order contains information which must be classified, only the order retained in the unit files and those copies which accompany the record of trial are to be complete. When the order contains obscene matter that is unfit for open publication, only the order retained in the unit files, those copies which accompany the record of trial, those which are furnished the chief custodian of the personnel records of the armed force concerned, the authorities of the command where the accused is held in custody or to which he is to be transferred, and the commander of the place where the accused is to be confined (if confinement is involved) are to be complete.

All other copies are prepared to eliminate, by use of asterisks, sufficient data to avoid the necessity of classification, and such obscene matter as may be unfit for open publication.

d. ***Distribution.***—Distribution of promulgating orders will be in accordance with pertinent departmental regulations. In this connection, however, see 91*a*, 91*b*, and appendices 9*e* and 10*b*.

e. ***Summary court-martial.***—An order promulgating the result of a trial by summary court-martial is not issued. In lieu thereof, the action of the convening authority will be shown on all three copies of the record of trial. See 79*e* and appendix 11. The action on the original copy will bear the signature of the convening authority; the action on the duplicate and triplicate copies either will bear the signature of the convening authority or will be prepared and certified as true copies of the original.

Each record of trial by summary court-martial (including those involving an acquittal) will be numbered serially by the convening authority in the order in which he receives them for action.

Any action taken on a summary court-martial case subsequent to the initial action of the convening authority will be promulgated in such orders as may be prescribed by pertinent departmental regulations.

91. DISPOSITION OF THE RECORD AND RELATED MATTERS.—*a.* ***General court-martial.***—A record of trial by general court-martial, with the action of the convening authority thereon, ordinarily will be transmitted without letter of transmittal direct to the Judge Advocate General of the armed force concerned. However, if the convening authority has taken an action contrary to that recommended by his staff judge advocate or legal officer, he should forward the record by a letter of transmittal containing an explanation of his action. See 85*c*.

With the original record of trial will be forwarded the accompanying papers (82*b*) and, unless otherwise prescribed by departmental regulations, 10 authenticated copies of the order promulgating the result of trial as to each accused and two signed copies of the review of the staff judge advocate or legal officer. If the approved sentence in the case affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for one year or more, two additional copies of the record of trial will be attached to the original record. If a copy of the record cannot be delivered to the accused for any reason, the copy prepared for him will also be attached to the record with an explanation of the reason for nondelivery.

See appendix 9*e* for the arrangement of the record and accompanying papers for forwarding.

b. ***Special court-martial.***—(1) *Action by convening authority.*—Except when he is authorized to forward a record of trial involving an approved sentence to bad conduct discharge direct to the appropriate Judge Advocate General (94*a* (3)), a convening authority of a special court-martial who does not exercise general court-martial jurisdiction will forward the record of trial, with his action thereon, direct to the officer exercising general court-martial jurisdiction over the command. With the record will be forwarded the accompanying papers and four authenticated copies of the order, if any, promulgating the result of trial (90*b*). If the case involves an approved bad conduct discharge, two additional copies of the record of trial will be attached to the original record. If a copy of the record cannot be delivered to the accused for any reason, the copy prepared for him will also be attached with a statement of the reasons for nondelivery. See appendix 9*e* for the arrangement of a verbatim record and appendix 10*b* for arrangement of the record in other cases.

When he is authorized to forward a record of trial involving an approved bad conduct discharge direct to the appropriate Judge Advocate General (94*a* (3)), a convening authority who does not exercise general court-martial jurisdiction will dispose of the record in the manner prescribed in 91*a* for records of trial by general courts-martial.

(2) *Action by officer exercising general court-martial jurisdiction.*—A record of trial by special court-martial which involves a sentence to bad conduct discharge approved by an officer exercising general court-martial jurisdiction (either as the convening authority or as prescribed in 94*a* (3)) will be disposed of in the manner prescribed in 91*a* for records of trial by general courts-martial.

c. ***Summary court-martial.***—The original and two copies thereof will, after action by the convening authority, be delivered to the custodian of the personnel records of the unit, who will, in the case of an approved sentence, enter the essential data on the service record of the accused and on such other records as may be prescribed by departmental regulations. A notation that such entry has been made will be recorded on all copies of the record of trial.

Thereafter, unless otherwise prescribed by departmental regulations, distribution of the copies of the record of trial will be made as follows: The original and one copy will be forwarded, ordinarily without letter of transmittal, to the officer exercising general court-martial jurisdiction over the command. The remaining copy will be retained in the unit files. Disposition of the retained copy will be in accordance with pertinent departmental regulations.

If the sentence, as ordered executed, involves confinement on bread and water or diminished rations, the medical certificate required by 125 will be attached to the original record of trial; a copy of such certificate will be attached to each copy of the record.

Chapter XVIII

ACTION

ORDERING REHEARING—PLACE OF CONFINEMENT

92. ORDERING REHEARING.—If the convening authority disapproves the findings of guilty and the sentence of a court-martial he may, except where there is lack of sufficient evidence in the record to support the findings, order a rehearing, in which case he shall state the reasons for disapproval (Art. 63*a*). A rehearing may not be ordered in a case in which there is a lack of evidence in the record to support a finding of guilty of the offense charged or of an offense necessarily included in that charged; but if proof of guilt consisted of inadmissible evidence, for which there is available an admissible substitute, a rehearing may properly be ordered. For example, if proof of guilt of absence without leave was made on the basis of improperly authenticated documentary evidence, over the objection of the defense, the convening authority may disapprove the findings of guilty and the sentence and order a rehearing if he has reason to believe that properly authenticated documentary evidence will be available for use at the rehearing. On the other hand, if no proof of unauthorized absence was introduced at the trial, a rehearing may not be ordered. If a sentence is disapproved because of any procedural error prejudicial to the substantial rights of the accused, a rehearing may properly be ordered, subject to the foregoing restrictions. A rehearing may be ordered as to any offense if the conviction thereof is based on a plea of guilty.

Under like limitations a rehearing may be ordered by a board of review (Art. 66*d*) or the Court of Military Appeals (Art. 67*e*). If a board of review or the Court of Military Appeals has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

A rehearing may not be ordered by an authority competent to take that action if, upon taking his final action, he approves a part of the sentence. The order directing a rehearing will be made at the time of disapproving or setting aside the sentence and will ordinarily be included in the action on such sentence. If, as a result of review by higher authority, a rehearing is ordered in a case in which the sentence or any part thereof has already been ordered into execution, the order of execution shall be vacated at the time the rehearing is ordered.

Additional charges (24*b*) may be referred for trial together with charges as to which a rehearing has been directed.

Every rehearing shall take place before a court-martial composed of members who were not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be imposed unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory (Art. 63*b*).

If, at the first trial, the accused is found guilty of a lesser included offense a rehearing may properly be ordered only as to such lesser included offense or as to an offense necessarily included in that found. If, however, a rehearing should be ordered improperly on the original offense charged and the accused should be found guilty thereof, such finding may be valid as to the lesser offense of which he was found guilty at the first trial. If the accused was found guilty of the offense charged on the first trial, a rehearing may be ordered as to any offense necessarily included therein, provided there is evidence in the record which tends to prove such lesser included offense.

When a rehearing is ordered by the convening authority there will be referred to the trial counsel, in order to inform him of the errors made at the former hearing which have necessitated the rehearing, not only the charges, but also the record of the former proceedings and all pertinent accompanying papers, together with a copy of any decision of the board of review or the Court of Military Appeals, the review of the staff judge advocate, and the statement by the convening authority of his reasons for disapproving the original sentence.

See 81 for the procedure to be followed at a rehearing, 89*c* (7) for the action by the convening authority upon the record of a rehearing, and 94*a* (2) for rehearings directed as a result of the action of the officer having supervisory authority with respect to summary court-martial cases and special court-martial cases in which a bad conduct discharge is not adjudged. For related provisions as to a new trial upon the application of the accused see 109–110.

If the convening or higher authority finds the original proceedings to be invalid because of lack of jurisdiction (8) or failure of the charges to allege any offense cognizable by courts-martial (68*b*), such authority will, in his action, state the basis for declaring the proceedings invalid. For form, see appendix 14. In such a case another trial may be directed and such trial is not subject to the restrictions prescribed by Article 63*b*. However, such a case should be referred to a court none of whose members has participated in the former trial.

93. PLACE OF CONFINEMENT.—For action of the convening authority in providing for the temporary custody of the accused pending final disposition of the case upon appellate review, see 89*c* (6) and appendix 14.

The authority who orders a sentence to confinement into execution shall designate the place of confinement in accordance with pertinent departmental regulations. Under such instructions as the Department concerned may prescribe, any sentence to confinement adjudged by a court-martial or other military tribunal, whether or not such sentence includes discharge or dismissal, and whether or not such discharge or dismissal has been executed, may be carried into execution by confinement in any place of confinement under the control of any of the armed forces, or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use; and persons so confined in a penal or correctional institution not under the control of one of the armed forces shall be subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District, or place in which the institution is situated (Art. 58*a*).

Chapter XIX

ACTION AFTER PROMULGATION

REVIEW OF SENTENCES AND FILING OF RECORDS OF SPECIAL AND SUMMARY COURTS-MARTIAL—CORRECTION OF RECORDS OF TRIAL SUBJECT TO APPELLATE REVIEW—REPORTS IN CERTAIN CASES—MISCELLANEOUS MATTERS

94. REVIEW OF SENTENCES AND FILING OF RECORDS OF SPECIAL AND SUMMARY COURTS-MARTIAL.—*a.* ***Review.***—(1) *General.*—The officer immediately exercising general court-martial jurisdiction over a command and such other authority as may be designated by the Secretary of a Department have supervisory powers over special and summary courts-martial in such command.

(2) *Review of records of trial pursuant to Article 65c.*—When forwarded to him for review (91), the officer having supervisory authority will cause a judge advocate, a law specialist, or a lawyer of the Coast Guard or Treasury Department to review records of trial by summary court-martial and records of trial by special court-martial which do not include approved sentences to bad conduct discharge (Art. 65*c*). If the action of the court has resulted in an acquittal of all charges and specifications, or if the convening authority has disapproved the findings of guilty and the sentence and has dismissed the charges, the review shall be limited to the question of jurisdiction. The officer having supervisory authority may, in the interest of justice, set aside in whole or in part findings of guilty and the sentence, and thereupon restore any rights, privileges, and property affected by that part of the sentence set aside; he may mitigate or suspend any part or amount of the unexecuted portion of the sentence.

The officer having supervisory authority may bring any fatal error to the attention of the convening authority or his successor. If warranted by the circumstances, he may advise the convening authority that he has the power to withdraw his previous action, disapprove the findings of guilty and the sentence, and either direct a rehearing or dismiss the charges pursuant to Article 63. See 92. After a finding of guilty upon a rehearing, the court will adjudge an appropriate sentence without regard to any credit to which the accused may be entitled by virtue of the prior execution of any part of the original sentence. See 81. Persons charged with the administrative duty of executing a sentence adjudged upon a rehearing after the sentence has been ordered into execution shall credit the accused with any executed portion or amount of the original sentence in computing the term or amount of punishment actually to be executed pursuant to the sentence adjudged upon such rehearing. See Article 75*a*.

If a review, made pursuant to this subparagraph, indicates that proceedings in revision (Art. 62*b*) are necessary, the record will be returned to the convening authority or to an officer competent to take the action of the convening authority (Art. 60) with advice to take the necessary action.

When, upon review pursuant to this paragraph, the proceedings, findings, and sentence as approved by the convening authority have been found correct in law and fact, the proceedings shall be final in the sense of Articles 44 and 76.

(3) *Review of special court-martial records pursuant to Article 65b.*—If the sentence of a special court-martial as approved by a convening authority who does not exercise general court-martial jurisdiction includes a bad conduct discharge, whether or not suspended, the record shall, ordinarily, be forwarded to the officer exercising general court-martial jurisdiction over the command to be reviewed and acted upon in the same manner as a record of trial by a general court-martial (Art. 65*b*). Such authority shall act only with respect to the findings of guilty and the sentence as approved or suspended by the convening authority. In the event the officer exercising general court-martial jurisdiction has no judge advocate or law specialist assigned to his staff, or if he deems direct transmittal to the Judge Advocate General more expeditious, the officer exercising general court-martial jurisdiction may authorize the convening authority to forward such records of trial directly to the appropriate Judge Advocate General to be reviewed by a board of review (Art. 65*b*). Such direct transmittal may be restricted or limited by the Secretary of a Department. If the sentence as approved by an officer exercising general court-martial jurisdiction (either as the convening authority (Art. 60) or as prescribed in this subparagraph) includes a bad conduct discharge, whether or not suspended, the record shall be forwarded to the appropriate Judge Advocate General to be reviewed by a board of review (Art. 65*b*). If the sentence as approved by the officer exercising general court-martial jurisdiction does not include a bad conduct discharge, the record of trial shall thereafter be treated as a special court-martial record not involving a bad conduct discharge.

b. ***Filing of records.***—After review as prescribed by 94*a* (2), records of trial by summary court-martial and records of trial by special court-martial which do not involve approved sentences to bad conduct discharge shall be transmitted and disposed of as the Secretary of a Department may prescribe by regulation. Special court-martial records which involve approved sentences to bad conduct discharge shall be filed in the office of the appropriate Judge Advocate General.

95. CORRECTION OF RECORDS OF TRIAL SUBJECT TO APPELLATE REVIEW.—When a record of trial by general court-martial, or a record of trial by special court-martial in which a sentence to bad conduct discharge has been approved, has been forwarded by a convening authority to higher authority and error of the kind mentioned in 86*c* and *d* is noted by the higher authority, the record will be returned to the convening authority (Art. 60) with directions for the correction of the record or revision of the proceedings.

When, as an incident of the review of a record of trial pursuant to Articles 65*b*, 66, 67, or 69, it is noted that the action of the convening authority or of a higher authority is incomplete, ambiguous, or contains clerical errors, the authority who took the incomplete, ambiguous, or erroneous action may be instructed to withdraw the original action and to substitute a corrected action therefor. See appendix 14 for a form of corrected action by the convening authority.

96. REPORTS IN CERTAIN CASES.—In the case of an officer, immediately upon promulgation of any sentence of a court-martial which does not require appellate review under Article 66 but which involves suspension from rank and command, restriction, or any other material change in the status of the officer, the commander issuing the order will, by prompt means, advise the appropriate officer of the Department concerned of the sentence imposed as approved or mitigated and the date of promulgation thereof.

Whenever an accused person under a court-martial sentence subject to review under Article 66 is transferred from the general court-martial jurisdiction which has been designated as the command having temporary custody of such accused (89*c* (6)) before such accused has been notified of the decision of the board of review, the officer ordering such transfer will, by prompt means, notify the appropriate Judge Advocate General.

97. MISCELLANEOUS MATTERS.—*a. **Remission and suspension.***—As to the power of the convening authority to mitigate or suspend a sentence at the time he takes his action or orders the sentence into execution, see 88 and Articles 64 and 71*d*.

The Secretary of a Department and, when designated by him, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may remit or suspend any part or amount of the unexecuted portion of any sentence, including all uncollected forfeitures, other than a sentence approved by the President (Art. 74*a*). The officials authorized by the Secretary of a Department to exercise these powers after the sentence has been ordered into execution shall be designated in departmental regulations. The officer having supervisory authority (94*a* (1)) and the commanding officer of the accused who has immediate authority to convene a court of the kind that adjudged the sentence are empowered to remit or suspend any part or amount of the unexecuted portion of any sentence by summary court-martial or of a sentence by special court-martial which does not include a bad conduct discharge. Such action may be taken without regard to whether the person acting has previously approved the sentence.

Any sentence (except a sentence to death) or any part thereof may be suspended under Article 71*d* or 74*a* for a period beyond any term of confinement but within the current enlistment or period of service. The period within which a sentence may be suspended may be further limited by departmental regulations. If the authority who suspends a sentence specifically provides in his action that the expiration of the period of suspension shall operate as a remission unless the suspension is sooner vacated (see app. 14), the expiration of the period of suspension without vacation thereof shall operate as a complete remission of the suspended sentence without further action. See 88*e*. The death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence. If an order of suspension is not vacated prior to the actual discharge of a military person not in confinement under the sentence, the confinement and other unexecuted portions of the sentence are remitted by execution of such discharge.

The Secretary of a Department may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial (Art. 74*b*).

b. ***Vacation of suspension.***—Prior to the vacation of the suspension of a special court-martial sentence which as approved includes a bad conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of probation. The probationer shall be represented at such hearing by counsel if he so desires (Art. 72*a*). Insofar as applicable the procedure at the hearing shall be similar to that prescribed for investigations conducted under the provisions of 34. See appendix 16 for a form of record of this proceeding and a procedural guide.

The record of the hearing and the recommendations of the officer having special court-martial jurisdiction shall be forwarded for action to the officer exercising general court-martial jurisdiction over the probationer. If this officer vacates the suspension, the vacation shall be effective to execute any unexecuted portion of the sentence except a dismissal or a sentence to dishonorable discharge, bad conduct discharge, or confinement for one year or more which has not been affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals (Art. 72*b*). If the original sentence includes dishonorable or bad conduct discharge or confinement for one year or more, such vacation will not be effective to execute the unexecuted portion of the sentence until completion of the appellate review provided by Articles 66 and 67. See Articles 71*c* and 72*b*. If the suspended sentence includes a dismissal, the unexecuted portion of the sentence may not be ordered into execution until such vacation is approved by the Secretary of the Department (Art. 72*b*).

The suspension of any sentence by summary court-martial, or of a sentence by special court-martial which does not include a bad conduct discharge, may be vacated (without a hearing) by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence. See Article 72*c*.

For forms of orders vacating suspension, see appendix 15.

c. ***Interruptions of execution of a sentence.***—A sentence to confinement, hard labor without confinement, restriction to limits, deprivation of privileges, or suspension from rank, command, or duty is continuous until the term expires, with certain exceptions. These exceptions include the following:

> When delivery under Article 14 is made to any civil authority of a person undergoing sentence of a court-martial, such delivery, if followed by conviction in a civil tribunal, shall be held to interrupt the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody for the completion of the said court-martial sentence (Art. 14*b*).
>
> Periods during which the person undergoing such a sentence is absent without authority, or is absent under a parole which proper authority has suspended and later revoked, or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is erroneously released from confinement upon his petition for a writ of habeas corpus under a court order which is later reversed by a competent tribunal, shall be excluded in computing the service of the term of the punishment.
>
> Periods during which a sentence to confinement is suspended shall be excluded in computing the service of the term of confinement (Art. 57*b*).

d. ***Changes in place of confinement.***—Subject to departmental regulations, the authority who designated the place of confinement, or higher authority, or any other authority authorized by departmental regulations, may change the place of confinement of any prisoner under his jurisdiction.

e. ***Distribution of court-martial orders.***—The distribution of orders promulgating the results of courts-martial and any action after promulgation of the sentence will be as prescribed in departmental regulations.

Chapter XX

APPELLATE REVIEW—EXECUTION OF SENTENCES

GENERAL—PRELIMINARY ACTION—REVIEW BY THE BOARD OF REVIEW—REVIEW BY THE COURT OF MILITARY APPEALS—APPELLATE COUNSEL—REVIEW IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL—BRANCH OFFICES—COMMUTATION, REMISSION, AND SUSPENSION—RESTORATION—COURT-MARTIAL ORDERS—FINALITY OF COURT-MARTIAL JUDGMENTS

98. GENERAL.—A sentence of a court-martial may not be executed until approved by the convening authority (Arts. 60, 61, 64, 65, 71*d*). A special court-martial sentence which, as approved by the convening authority, includes a bad conduct discharge must, generally, also be approved by the officer exercising general court-martial jurisdiction over the command (94*a* (3); Art. 65*b*). In addition to such approval, certain sentences may not be executed until approved or affirmed by higher authority. The scope of this chapter deals generally with departmental review, review by the Court of Military Appeals, and approval by the Secretary of a Department and by the President.

No court-martial sentence extending to death or involving a general or flag officer shall be executed until affirmed by a board of review and the Court of Military Appeals and approved by the President (Arts. 66*b*, 67*b* (1) and 71*a*). No sentence extending to the dismissal of an officer (other than a general or flag officer), cadet, or midshipman shall be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals, and approved by the Secretary of the Department concerned (or such Under Secretary or Assistant Secretary as may be designated by him) (Arts. 66*b*, 71*b*). No sentence to dishonorable or bad conduct discharge (whether or not suspended) shall be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals. No sentence which includes, unsuspended, a dishonorable or bad conduct discharge, or confinement for one year or more shall be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals (Arts. 67*b*, 71*c*, 72*b*). All other court-martial sentences, unless suspended, may be ordered executed by the convening authority when approved by him (Art. 71*d*).

99. PRELIMINARY ACTION.—All records of trial by general courts-martial and records of trial by special courts-martial which, as approved by the convening authority and by the officer exercising general court-martial jurisdiction over the command, include a bad conduct discharge are forwarded after approval by the proper authority (Arts. 65*a*, *b*) to the Judge Advocate General of the armed force of which the accused is a member (Arts. 17*b*, 65). In all cases so forwarded, a general or special court-martial order announcing the result of the trial and the action of the convening or higher authority will be promulgated prior to forwarding.

See 88 as to sentences and portions of sentences which may be ordered into execution prior to forwarding.

100. REVIEW BY THE BOARD OF REVIEW.—*a.* ***General.***—The Judge Advocate General shall refer to a board of review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for one year or more (Art. 66*b*). In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by proper authority. It shall affirm only such findings of guilty or such part of a finding of guilty as includes a lesser included offense, and the sentence or such part of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses (Art. 66*c*).

A finding or sentence of a court-martial shall not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused (Art. 59*a*).

b. ***Action when sentence is set aside.***—(1) If the board of review sets aside the findings of guilty and the sentence it may, except when the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing it shall order the charges to be dismissed (Art. 66*d*).

(2) In his discretion, the Judge Advocate General may forward the decision of the board of review and the record of trial to the Court of Military Appeals for review with respect to any matter of law (Art. 67*b* (2), 67*d*). In such cases he will cause a copy of the decision of the board of review and his order of reference to be served upon the accused and upon the appellate defense counsel.

(3) If the Judge Advocate General does not order the case forwarded to the Court of Military Appeals he shall advise the convening authority (84; Art. 60) to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing the record shall be returned to the convening authority.

If the convening authority finds a rehearing impracticable, he may dismiss the charges (Art. 66*e*). Ordinarily, the final action will be promulgated by the convening authority. If the charges are dismissed, all rights, privileges, and property affected by an executed portion of the sentence which has been set aside, except an executed dismissal or discharge, shall be restored (Art. 75*a*). See 109*j* and 110 as to the action which may be taken if an executed dismissal or dishonorable or bad conduct discharge is not sustained on a new trial.

c. ***Action when sentence is affirmed in whole or in part.***—(1) *Sentences which do not require the approval of the President.*—(*a*) If the sentence, as affirmed by the board of review extends to dismissal, dishonorable or bad conduct discharge, or confinement for one year or more, the Judge Advocate General, in his discretion, may take the action prescribed in 100*b* (2) above. Otherwise he will transmit a copy of the preliminary court-martial order (90*b* (1)) and two copies of the decision of the board of review, with such instructions as to future action as may be appropriate (Art. 66*e*) and with instructions to cause a copy of the decision to be served upon the accused, to the officer immediately exercising general court-martial jurisdiction over the command which includes the accused. This copy will bear an indorsement notifying the accused of his right to petition the Court of Military Appeals for a grant of a review with respect to any matter of law within 30 days from the time he is notified of the decision of the board of review, and that any petition for a grant of review will be forwarded through the officer immediately exercising general court-martial jurisdiction over the accused and through the appropriate Judge Advocate General. The receipt of the accused for the copy of the decision of the board of review, in duplicate (or a certificate of service upon him), showing the date of such service will be transmitted by expeditious means to the appropriate Judge Advocate General. The latter will forward one copy of the receipt or certificate of service to the Clerk of the Court of Military Appeals. If the officer who exercises immediate general court-martial jurisdiction over the accused is not the officer who convened the court (or his successor in command) the Judge Advocate General shall also transmit a copy of the decision of the board of review to such convening authority for his information.

The accused shall have 30 days from the time he is notified of the decision of a board of review to petition the Court of Military Appeals for a grant of review. If the accused does not so petition, the convening authority, or the officer immediately exercising general court-martial jurisdiction over the accused, or the Secretary of the Department concerned (Art. 60) may order any sentence which, as affirmed by the board of review, extends to dishonorable or bad conduct discharge or confinement for one year or more into execution or take such other authorized appropriate action (Art. 74*a*) as the circumstances may warrant.

(*b*) If an accused, whose sentence as affirmed by the board of review extends to dismissal, does not forward a timely petition for a grant of review, the Judge Advocate General will transmit the record, the decision of the board of review, and his recommendations to the Secretary of the Department or to the appropriate Under Secretary or Assistant Secretary for action under Article 71*b*. Such Secretary shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of any part of the sentence approved by him. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person who is so reduced may be required to serve for the duration of the war or emergency and six months thereafter (Art. 71*b*). The action of the Secretary of the Department will be promulgated by departmental court-martial orders.

(*c*) If the accused forwards a timely petition for a grant of review no supplemental order of execution will be promulgated until final action by the Court of Military Appeals is taken.

(2) *Sentences which require the approval of the President.*—If the board of review affirms any sentence which affects a general or flag officer or which, as affirmed by it, extends to death, the Judge Advocate General shall transmit the record of trial and the decision of the board of review with his recommendations directly to the Court of Military Appeals. He shall cause a copy of the decision of the board of review to be served upon the accused and upon the appellate defense counsel.

d. ***Rules of procedure.***—Uniform rules of procedure for proceedings in and before boards of review are prescribed from time to time by the Judge Advocates General of the armed forces.

101. REVIEW BY THE COURT OF MILITARY APPEALS.—Under such rules as it may prescribe, the Court of Military Appeals shall review the record in the following cases (Art. 67*b*):

(1) All cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;

(2) All cases reviewed by a board of review which the Judge Advocate General orders forwarded to the Court of Military Appeals for review; and

(3) All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review. (But see 103 and Art. 69.)

The accused shall have 30 days from the time he is notified of the decision of a board of review to petition the Court of Military Appeals for a grant of review. The court shall act upon such a petition within 30 days of the receipt thereof (Art. 67*c*).

In any case reviewed by it, the Court of Military Appeals shall act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review. In a case which the Judge Advocate General orders forwarded to the Court of Military Appeals, such action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, such action need be taken only with respect to issues specified in the grant of review. The Court of Military Appeals shall take action only with respect to matters of law (Art. 67*d*).

If the Court of Military Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing it shall order that the charges be dismissed (Art. 67*e*).

After it has acted on a case, the Court of Military Appeals may direct the Judge Advocate General to return the record to the board of review for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President, or the Secretary of the Department, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges (Art. 67*f*).

If the sentence, as affirmed by the Court of Military Appeals, requires the action of the Secretary of a Department, action thereon will be taken in accordance with the procedures prescribed in 100*c* (1) (*b*). If the sentence as affirmed by the Court of Military Appeals extends to death or affects a general or flag officer, the record of trial, the decision of the board of review, the recommendations of the Judge Advocate General, and the decision of the Court of Military Appeals shall be transmitted to the Secretary of the Department concerned for the action of the President pursuant to Article 71*a*.

102. APPELLATE COUNSEL.—*a.* ***Appointment.***—The Judge Advocate General shall appoint in his office one or more officers as appellate Government counsel, and one or more officers as appellate defense counsel who shall be qualified under the provisions of Article 27*b* (1) (Art. 70*a*).

b. ***Duties.***—It shall be the duty of appellate Government counsel to represent the United States before the board of review or the Court of Military Appeals when directed to do so by the Judge Advocate General (Art. 70*b*).

It shall be the duty of appellate defense counsel to represent the accused before the board of review or the Court of Military Appeals (Art. 70*c*)—

(1) when he is requested to do so by the accused; or

(2) when the United States is represented by counsel; or

(3) when the Judge Advocate General has transmitted a case to the Court of Military Appeals.

For duties of the defense counsel who conducted the defense at the trial with respect to advising the accused of his right to be represented by the appellate defense counsel in connection with the appellate review of his case, see 48*j* (3).

If his opinion is requested, the appellate defense counsel will, to the best of his professional knowledge, advise the accused as to whether there are meritorious grounds for petitioning the Court of Military Appeals for a grant of review. If the appellate defense counsel is convinced that there are no substantial questions of law presented by the record of trial with respect to the findings of guilty and the sentence as affirmed by the board of review, he should so advise the accused. Regardless of his personal opinion as to the merit of the issues which can be raised, the appellate defense counsel will, if requested, assist the accused in the preparation of his petition and render such other assistance as may be proper if the accused decides to petition for a grant of review. He is authorized to communicate directly with the accused and with his counsel in the field. Such communications are privileged.

In any case in which the sentence as affirmed by the board of review is subject to review by the Court of Military Appeals, the officer exercising general court-martial jurisdiction over the accused shall, if requested by the accused, detail a qualified counsel to advise and assist the accused in connection with any proper matter concerning further appellate review. If he is reasonably available, the defense counsel who conducted the defense during the trial may perform these duties.

*c. **Civilian counsel.***—The accused shall have the right to be represented before the Court of Military Appeals or the board of review by civilian counsel if provided by him (Art. 70*d*).

103. REVIEW IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL.—Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by Article 66, shall be examined in the office of the Judge Advocate General. If any part of the findings or sentence is found unsupported in law, or if the Judge Advocate General so directs, the record shall be reviewed by a board of review in accordance with Article 66, but in such event there will be no further review by the Court of Military Appeals unless the Judge Advocate General orders the record forwarded to the Court of Military Appeals pursuant to Article 67*b* (2) (Art. 69).

If a record of trial by general court-martial is referred to a board of review pursuant to Article 69, the Judge Advocate General shall advise the appellate defense counsel of such reference if the accused has requested representation before the board of review (48*j* (3)); otherwise, the accused shall be advised of such reference and of his right to representation before the board of review pursuant to Article 70 provided he forwards a prompt request for such representation.

If the Judge Advocate General forwards a case to the Court of Military Appeals for review he will take the action prescribed in 100*b* (2).

104. BRANCH OFFICES.—Boards of review established in branch offices of the Judge Advocate General with distant commands and the Assistant Judge Advocates General in charge of such offices perform their duties in the manner prescribed for the Judge Advocate General and boards of review in his office. They operate under the general supervision of the Judge Advocate General. Records of trial involving sentences requiring action by the President shall be forwarded directly to the Judge Advocate General without action in the branch offices. See Article 68.

105. COMMUTATION, REMISSION, AND SUSPENSION.—*a. **Commutation.***—The power to commute, that is to change a punishment to one of a different nature, may be exercised by the President and by the Secretary of a Department (or such Under Secretary or Assistant Secretary as may be designated by him). See Articles 71*a* and *b*.

*b. **Remission and suspension.***—If the Judge Advocate General is of the opinion that a sentence as affirmed by the board of review which does not require the approval of the President should be remitted or suspended in whole or in part, he may, before taking the action prescribed in 100*c* (1), transmit the record of trial and the decision of the board of review with his recommendations in the premises to the Secretary of the Department for action pursuant to Article 74, or take such action as may be authorized by the Secretary of the Department under the provisions of Article 74. See also 97*a*.

106. RESTORATION.—See 109*j* and 110 as to action which may be taken when the sentence adjudged upon a new trial is set aside or disapproved.

In other cases all rights, privileges, and property affected by an executed portion of a sentence which has been set aside or disapproved by any competent authority shall be restored unless a new trial or rehearing is ordered and such executed portion is included in a sentence imposed upon the new trial or rehearing (Art. 75*a*). Ordinarily, any restoration should be announced in the court-martial order promulgating the final results of the proceedings (90*b* (2), 107; app. 15*b*).

107. COURT-MARTIAL ORDERS.—General court-martial orders publishing the final results of proceedings in cases in which the President or the Secretary of a Department has taken final action are promulgated by departmental orders. In other cases the final action may be promulgated, as may be appropriate under the circumstances, by the convening authority, or an officer exercising general court-martial jurisdiction over the accused at the time of final action, or by the Secretary of the Department.

108. FINALITY OF COURT-MARTIAL JUDGMENTS.—The appellate review of records of trial provided by the code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by the code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation as required by the code, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in Article 73 and to action by the Secretary of a Department as provided in Article 74, and the authority of the President (Art. 76).

Chapter XXI

NEW TRIAL AND RELATED MATTERS

OFFENSES COMMITTED AFTER 30 MAY 1951—WORLD WAR II OFFENSES—RIGHT OF DISMISSED OFFICER TO TRIAL BY COURT-MARTIAL

109. OFFENSES COMMITTED AFTER 30 MAY 1951.—*a.* ***General.***—At any time within one year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable discharge, or bad conduct discharge, or confinement for one year or more, and which is based upon a conviction of an offense committed after 30 May 1951, the accused may petition the Judge Advocate General for a new trial on grounds of newly discovered evidence or fraud on the court (Art. 73).

A petition may not be submitted after the death of an accused.

Article 73 does not require that the execution of a sentence be delayed to permit a petition for a new trial. Presentation of a petition does not, of itself, operate to stay the execution of a sentence.

b. ***Who may petition.***—A petition for a new trial may be submitted either by the accused or by his counsel or representative regardless of whether the accused is in the service or has been separated therefrom. See 109*e*.

c. ***Who may act on petition.***—If the case of an accused is pending before a board of review or before the Court of Military Appeals, the Judge Advocate General shall refer the petition to the board or court, respectively, for action. Otherwise, the Judge Advocate General of the armed force which reviewed the previous trial shall act upon the petition except that petitions submitted by persons who, at the time of trial and sentence from which such petitioner seeks relief, were members of the Coast Guard, and who are members of the Coast Guard at the time the petition is submitted, will be acted upon in the Department in which the Coast Guard is serving at the time the petition is so submitted, i. e., either by the Judge Advocate General of the Navy or the General Counsel of the Treasury Department, as the case may be. See Article 73.

d. ***Grounds for new trial.***—(1) *General.*—A new trial under the provisions of Article 73 will be granted only upon the grounds of newly discovered evidence or fraud on the court. Sufficient grounds for granting a new trial will be deemed to exist only if within the discretion of the authority considering the petition all the facts and information before such authority, including, but not limited to, the record of trial, the petition, and other matters presented by the accused affirmatively establish that an injustice has resulted from the findings or the sentence and that a new trial would probably produce a substantially more favorable result for the accused.

(2) *Newly discovered evidence.*—A new trial will not be granted on the grounds of newly discovered evidence unless the petition shows:

(*a*) That the evidence is in fact newly discovered, that is, discovered since the trial.

(*b*) That the petitioner exercised due diligence to discover the evidence at the time of trial.

(*c*) That the newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

(3) *Fraud on the court.*—No alleged fraud on the court will be deemed to constitute good cause unless it had a substantial contributing effect upon the findings of guilty or upon the sentence adjudged.

Examples of fraud on the court which may warrant the granting of a new trial are:

(*a*) Confessed or proved perjury in testimony or forgery of documentary evidence which clearly had a substantial contributing effect upon a finding of guilty and without which there probably would have been a finding of not guilty or a failure of proof of the offense alleged.

(*b*) Willful concealment by the prosecution from the defense of exculpatory evidence which, if produced and considered by the court in the light of all the other evidence, would probably have resulted in a finding of not guilty.

(*c*) Willful concealment of a material ground for challenge of the law officer or any member of the court or of the disqualification of any official of the court or the convening authority where such ground or disqualification is not known to the defense at the time of trial.

e. ***Form of petition.***—The petition will be in writing. It will be signed under oath or affirmation by the accused, or by a person possessing the power of attorney of the accused for the purpose, or by a person with the authorization of an appropriate court of law to sign the petition as the representative of the accused. It will be forwarded in triplicate directly to the Judge Advocate General of the armed force concerned. When practicable, the petition will be typewritten with lines double spaced and will contain the following:

(1) The name and service number of the accused, the date of the trial, and the present address of the accused.

(2) The request for a new trial.

(3) The sentence or a description thereof as approved or affirmed, together with any subsequent reduction thereof by clemency or otherwise.

(4) A brief description of any finding or sentence believed to be unjust.

(5) A full statement of the newly discovered evidence or fraud on the court relied upon for the remedy sought.

(6) Affidavits pertinent to the facts asserted in (5) above.

(7) The affidavit of each person whom the accused expects to present as a witness in the event of a new trial. Each affidavit should set forth briefly the relevant facts within the personal knowledge of the affiant.

f. ***Action upon petition.***—In cases referred to a board of review, it shall take action in accordance with the procedure prescribed by the Judge Advocate General of the armed force concerned. In cases referred to it, the Court of Military Appeals shall take action in accordance with its rules. The authority considering the petition may cause such additional investigation to be made and such additional information to be secured as he may deem appropriate.

Upon written request and within his discretion, the authority considering the petition may allow oral argument upon a petition. Any hearing held by the Judge Advocate General or by a board of review will be conducted under rules prescribed by the Judge Advocate General. If the petition is considered by the Judge Advocate General, the hearing may be before him or before an officer or officers designated by him.

If the Judge Advocate General is of the opinion that meritorious grounds for relief under Article 74 have been established but that a new trial is not indicated, he may transmit the petition and related papers to the Secretary of the Department concerned with his recommendations in the premises for action under Article 74.

A new trial should not be granted by a board of review or the Court of Military Appeals if a consideration of the record of trial indicates that appropriate action should be taken under Articles 66*d* or 67*e*.

g. ***Conduct of new trial.***—(1) If a new trial is granted, the Judge Advocate General shall designate a convening authority who has power to convene a court-martial appropriate for the trial of the case. The new trial shall be held at such time and place as the convening authority directs.

(2) Every new trial shall take place before a court-martial composed of persons who were not members of the court-martial which first heard the case. Upon a new trial, the accused shall not be tried for any offense of which he was found not guilty, or upon which he was not tried by the first court-martial, and no sentence in excess of or more severe than the original sentence as approved or affirmed shall be adjudged.

(3) If the accused is found guilty upon any charge or specification on a new trial the court will, subject to the foregoing limitations, adjudge an appropriate sentence without regard to any credit to which the accused may be entitled by virtue of the prior execution of any part of the sentence. See 81*d*.

h. ***Action by the convening authority upon the record.***—The convening authority's action is the same as in other cases except that he may not order any part of the sentence executed. See 88*d*, 89, and appendix 14.

i. ***Disposition of record of new trial.***—Irrespective of the result of the new trial, the record thereof shall be forwarded to the appropriate Judge Advocate General after action by the convening authority and, in special court-martial cases reviewed by him, by the officer exercising general court-martial jurisdiction over the command, or by another officer having supervisory authority (94).

j. ***Restoration; disposition of original sentence.***—Except as hereafter provided, the Secretary of the Department concerned will order the restoration of rights, privileges, and property affected by an executed portion of a court-martial sentence which has not again been adjudged upon a new trial or which, after the new trial, has not been sustained upon the action of any reviewing authority (Arts. 60, 65, 66, 67). Such Secretary shall set aside so much of the findings and so much of the sentence adjudged upon the original trial as may be appropriate.

If a previously executed sentence to dishonorable or bad conduct discharge is not sustained on a new trial, the Secretary of the Department shall substitute therefor a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of his enlistment (Art. 75*b*).

If a previously executed sentence to dismissal is not sustained on a new trial, the Secretary of the Department shall substitute therefor a form of discharge authorized for administrative issuance, and the officer dismissed by such sentence may be reappointed by the President alone to such commissioned rank and precedence as in the opinion of the President such former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to position vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and such reappointment shall be considered as actual service for all purposes, including the right to receive pay and allowances (Art. 75*c*).

k. ***Court-martial orders.***—Court-martial orders promulgating the final action taken as a result of a new trial including any restoration of rights, privileges, and property, shall be promulgated by departmental orders. See appendix 15*b*.

l. ***Action by persons charged with the execution of the sentence.***—Persons charged with the administrative duty of executing a sentence adjudged upon a new trial after it has been ordered into execution shall credit the accused with any executed portion or amount of the original sentence in computing the term or amount of punishment actually to be executed pursuant to the new sentence. For example, if one year of an original sentence to confinement for five years has been executed, and a sentence to confinement for three years is adjudged and approved upon a new trial, the accused will be credited with the confinement for one year already served, leaving only confinement for two years of the new three-year sentence yet to be executed.

110. WORLD WAR II OFFENSES.—*a.* ***General.***—With respect to all trials by general courts-martial which resulted in a conviction and with respect to any trial resulting in an approved sentence including a bad conduct discharge adjudged by any lesser court-martial for a violation of the Articles of War, the Articles for the Government of the Navy, or the disciplinary laws of the Coast Guard, committed at any time between 7 December 1941 and 30 May 1951, inclusive, an accused may, within one year after final disposition of the case upon initial appellate review or at any time before 31 May 1952, whichever is the later date, petition the Judge Advocate General of the armed force concerned to grant relief. Upon good cause shown, such Judge Advocate General may grant a new trial, or vacate the findings and sentence adjudged, and may order the restoration of rights, privileges, and property affected by the sentence, and in a proper case order the substitution for a dismissal, dishonorable discharge, or bad conduct discharge, previously executed, of a form of discharge authorized for administrative issuance (sec. 12, act 5 May 1950, 64 Stat. 147; 50 U. S. C. 740).

Completion of review and of any confirming, approving, or affirming action required under the Articles of War, the Articles for the Government of the Navy, the disciplinary laws of the Coast Guard, the Uniform Code of Military Justice, and any regulations prescribed under any of the foregoing statutes constitutes final disposition of a case upon initial appellate review.

A petition may not be submitted after the death of an accused.

Section 12 does not require that the execution of a sentence be delayed to permit a petition for a new trial. Presentation of a petition does not, of itself, operate to stay the execution of a sentence.

b. ***Who may petition.***—See 109*b*.

c. ***Who may act on a petition.***—Action on a petition for relief under Section 12 will ordinarily be taken by the Judge Advocate General of the armed force which reviewed the previous trial except that:

(1) Petitions submitted by persons who, at the time of trial and sentence from which such petitioners seek relief, were members of the U. S. Army Air Corps, the Army Air Forces, or the United States Air Force will be acted upon by the Judge Advocate General, United States Air Force; and

(2) Petitions submitted by persons who, at the time of trial and sentence from which such petitioners seek relief, were members of the Coast Guard, and who are members of the Coast Guard at the time the petition is submitted, will be acted upon in the Department in which the Coast Guard is serving at the time the petition is so submitted.

d. ***Finality.***—Only one petition may be entertained with regard to any one case. Final action upon a petition submitted pursuant to Article of War 53 shall be a bar to the consideration of any further petition under Section 12.

e. ***Grounds.***—Relief under Section 12 will be granted only upon good cause shown. Good cause for granting a new trial, for vacation of findings or a sentence, or for another remedy shall be deemed to exist only if, within the discretion of the Judge Advocate General of the armed force concerned, all the facts and information before him, including, but not limited to, the record of trial, the petition, and other matter presented by the accused, affirmatively establish that an injustice has resulted from the findings or sentence. No fact, ruling, or error other than matters relating to jurisdiction will be deemed to constitute good cause unless it had a substantial contributing effect upon the findings of guilty or upon the sentence imposed.

The principles of 109*d*(2) and (3) are equally applicable to petitions for relief under Section 12 with respect to petitions wherein the ground for relief relied upon is newly discovered evidence or fraud on the court.

f. ***Form of petition.***—The form for a petition for relief under Section 12 in general shall be that prescribed in 109*e* above except that the petition will indicate under (2) thereof the specific relief requested and will provide a full statement of the fact, ruling, or error which is relied upon as good cause for the remedy sought under (5).

g. ***Procedure.***—Upon written request and within his discretion, the Judge Advocate General may allow oral argument upon a petition. Any hearing held will be conducted under rules prescribed by the Judge Advocate General. The hearing may be before the Judge Advocate General or before an officer or officers designated by him. The Judge Advocate General may cause such additional investigation to be made and such additional evidence to be secured as he may deem appropriate.

Action in granting or denying a remedy under Section 12 shall be taken by the Judge Advocate General in writing signed in his own hand or by his direction. When appropriate, the action granting relief will be published in departmental orders.

h. ***Conduct of new trial.***—The principles of 109*g* (1) and (2) apply equally to the conduct of new trials under Section 12. See 81*d*.

i. ***Action by the convening authority upon the record.***—See 88*d*, 89, and appendix 14. In approving any sentence adjudged upon a new trial under Section 12, the convening authority may consider the executed portion of the prior sentence as a matter in mitigation.

j. ***Disposition of record of new trial.***—The principles of 109*i* apply equally to records of new trial under Section 12.

k. ***Court-martial orders.***—The principles of 109*k* apply equally to court-martial orders promulgating the final results of new trials under Section 12.

111. RIGHT OF DISMISSED OFFICER TO TRIAL BY COURT-MARTIAL.—When any officer, dismissed in time of war by order of the President (see sec. 10, act 5 May 1950, 64 Stat. 107, 146; 50 U. S. C. 739), makes a written application for trial by court-martial, setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall cause a general court-martial to be convened to try such officer on the charges on which he was dismissed. A court-martial so convened shall have jurisdiction to try the dismissed officer on such charges, and he shall be held to have waived the right to assert any statute of limitations applicable to any offense with which he is charged. The court-martial may, as part of its sentence, adjudge the affirmance of the dismissal, but if the court-martial acquits the accused or if the sentence adjudged, as finally approved or affirmed, does not include dismissal or death, the Secretary of the Department shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issuance (Art. 4*a*).

If the President fails to convene a general court-martial within six months from the presentation of an application for trial under Article 4, the Secretary of the Department shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issuance (Art. 4*b*).

Where a discharge is substituted for a dismissal under the authority of Article 4, the President alone may reappoint the officer to such commissioned rank and precedence as in the opinion of the President such former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to position vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and such reappointment shall be considered as actual service for all purposes, including the right to receive pay and allowances (Art. 4*c*).

When an officer is discharged from any armed force by administrative action or is dropped from the rolls by order of the President, there shall not be a right to trial under Article 4 (Art. 4*d*).

Chapter XXII

OATHS

OATHS IN TRIALS BY COURTS-MARTIAL—AUTHORITY TO ADMINISTER OATHS—FORMS OF OATHS

112. OATHS IN TRIALS BY COURTS-MARTIAL.—*a.* ***General.***—In this chapter, unless the context indicates the contrary, the word "oath" includes the word "affirmation." In the administration of an affirmation, the words "So help you God" are omitted. Matters concerning oaths in proceedings of courts of inquiry are found in Article 135.

b. ***Persons required to be sworn.***—Prior to functioning in a trial, the law officer, all interpreters, and, in general and special courts-martial, the members, the trial counsel, assistant trial counsel, the defense counsel, assistant defense counsel, individual counsel, if any, and the reporter shall take an oath or affirmation in the presence of the accused to perform their duties faithfully (Art. 42*a*). All witnesses before courts-martial shall be examined on oath or affirmation (Art. 42*b*). All persons whose testimony is taken by deposition shall be examined on oath or affirmation (117*a*; Art. 49*c*). See 114 for the oath of the escort on views or inspections by the court. Concerning the entry to be made in the record of each trial that the required oaths have been duly administered, see appendices 9 and 10.

c. ***Oaths to be taken in the presence of accused.***—The officials and clerical assistants of the court who are required to act under oath during the trial of a case by a general or special court-martial must be sworn in the presence of the accused either (1) at the beginning of the trial of each accused or (2) at the first session of the court when the court sits for more than one trial and the accused in each trial is present in the court at the time the officials and clerical assistants thereof are initially sworn, such oaths to be effective for the trials of all accused then before the court.

See also 61*h* and appendix 8 concerning the point in the proceedings at which each of the various oaths is usually administered.

d. ***Procedure for administering oaths.***—There is no particular procedure which must be used in administering an oath. As long as the prescribed oath is duly administered, any procedure which appeals to the conscience of the person to whom the oath is administered and which binds him to speak the truth is sufficient. The customary procedure in administering the prescribed oath to military personnel consists (1) of requiring the person taking it to place a hand upon a Bible while the oath is administered or (2) of the raising of the right hand by both the individual administering the oath and the individual taking the oath at the time of the reading thereof and the response thereto. Persons who recognize peculiar forms or rites as obligatory, and believers in other than the Christian religion, may be sworn in their own manner or according to the peculiar ceremonies of the religion they profess and which they declare to be binding.

While the law officer, members, trial counsel and assistants, defense counsel and assistants, and individual counsel, if any, are being sworn, all persons present will stand. While any other person is being sworn, he and the officer administering the oath will stand. If the trial counsel is to testify, his oath as a witness will be administered by the president; if the assistant trial counsel is to testify, the trial counsel will administer the oath.

113. AUTHORITY TO ADMINISTER OATHS.—The following persons on active duty in the armed forces shall have authority to administer oaths necessary in the performance of their duties: The president, law officer, trial counsel, and assistant trial counsel for all general and special courts-martial; the president and the counsel for the court of any court of inquiry; all officers designated to take a deposition; all persons detailed to conduct an investigation; all recruiting officers; and all other persons designated by regulations of the armed forces or by statute (Art. 136*b*).

For other persons who are authorized to administer oaths, see Articles 49*c* and 136*a*, and the footnotes under Article 136 and section 8, act of 5 May 1950 (app. 2*a*, *b*).

114. FORMS OF OATHS.—Subject to the provisions of 112*c*, before a general court-martial shall proceed upon any trial the trial counsel shall administer to the *law officer* the following oath or affirmation:

> "You, AB, do swear (or affirm) that you will faithfully and impartially perform, according to your conscience and the laws and regulations provided for trials by courts-martial, all the duties incumbent upon you as law officer of this court; that if any doubt should arise not explained by the laws and regulations, then according to the best of your understanding and the custom of war in like cases; and that you will not divulge the findings or sentence in any case until they shall have been duly announced by the court. So help you God."

Subject to the provisions of 112*c*, before a general or special court-martial shall proceed upon any trial the trial counsel shall administer to the *members* of the court-martial the following oath or affirmation:

"You, AB, CD * * * and YZ, do swear (or affirm) that you will faithfully perform all the duties incumbent upon you as a member of this court; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws and regulations provided for trials by courts-martial, the case of (the) (each) accused now before this court; and that if any doubt should arise not explained by the laws and regulations, then according to the best of your understanding and the custom of war in like cases; that you will not divulge the findings and sentence in any case until they shall have been duly announced by the court; and that you will not disclose or discover the vote or opinion of any particular member of the court upon a challenge or upon the findings or sentence unless required to do so before a court of justice in due course of law. So help you God."

When the oath or affirmation has been administered to the law officer and members of a general court-martial or to the members of a special court-martial, the president of the court shall administer to the *trial counsel* and to each *assistant trial counsel*, if any, and thereafter to the *defense counsel* and to each *assistant defense counsel*, if any, and to the *individual counsel*, if any, the following oath or affirmation:

"You, AB, CD * * * and JK, do swear (or affirm) that you will faithfully perform the duties of (trial counsel) (defense counsel) (individual counsel) and will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God."

Every *reporter* of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation, administered by the trial counsel, in the following form:

"You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God."

Every *interpreter* in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation, administered by the trial counsel, in the following form:

"You swear (or affirm) that you will faithfully perform the duties of interpreter in the case now in hearing. So help you God."

All *persons who testify* before a court-martial shall be examined on oath or affirmation, administered by the trial counsel before they first testify, in the following form:

"You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."

When a member is challenged concerning his competency to serve, the trial counsel shall administer the following oath or affirmation to the *challenged member* who is to be examined under oath as to his competency:

"You swear (or affirm) that you will answer truthfully to the questions touching your competency as a member of the court in this case. So help you God."

The *escort* on views or inspections by the court shall, before entering upon his duties as escort, take the following oath or affirmation which shall be administered by the trial counsel:

"You swear (or affirm) that you will escort the court and will well and truly point out to them (the place in which the offense charged in this case is alleged to have been committed) (   ); and that you will not speak to the court concerning (the alleged offense) (   ), except to describe (the place aforesaid) (   ). So help you God."

The form of *oath to charges*, which shall be administered by an *officer* of the armed forces authorized to administer oaths, is as follows:

"You swear (or affirm) that you are a person subject to the Uniform Code of Military Justice; that you have personal knowledge of or have investigated the matters set forth in the foregoing charge(s) and specification(s); and that the same are true in fact to the best of your knowledge and belief. So help you God."

The oath administered by the investigating officer to *witnesses in an investigation under Article 32* is as follows:

"You swear (or affirm) that the (statement given by you is) (evidence you are about to give shall be) the truth, the whole truth, and nothing but the truth. So help you God."

All *persons whose testimony is taken by deposition*, whether on oral examination or by written interrogatories, shall, before they testify, be examined on oath or affirmation, administered by the officer (civil or military) taking the deposition, in the following form:

"You swear (or affirm) that the evidence you are about to give shall be the truth, the whole truth, and nothing but the truth. So help you God."

Chapter XXIII

INCIDENTAL MATTERS

ATTENDANCE OF WITNESSES—EMPLOYMENT OF EXPERTS—DEPOSITIONS—CONTEMPTS—EXPENSES OF COURTS-MARTIAL

115. ATTENDANCE OF WITNESSES.—*a. General.*—The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence. Process issued in courts-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, its Territories, and possessions (Art. 46).

The formal written instrument (process) that serves to summon a witness to appear and testify is termed a *subpoena.* Such process cannot be used for the purpose of compelling a witness to appear at an examination before trial. See, however, Article 135 as to courts of inquiry.

In this paragraph (115) the term "trial counsel" includes a summary court-martial unless the context indicates otherwise. See 79*b* concerning the authority of summary courts-martial to compel the attendance of witnesses.

The trial counsel will take timely and appropriate action to provide for the attendance of those witnesses who have personal knowledge of the facts at issue in the case for both the prosecution and the defense. He will not of his own motion take such action with respect to a witness for the prosecution unless satisfied that the testimony of the witness is material and necessary. See Article 49*d* concerning the conditions under which a deposition, to be admissible, may be taken. The trial counsel will take similar action with respect to all witnesses requested by the defense, except that where there is disagreement between the trial counsel and the defense counsel as to whether the testimony of a witness so requested would be necessary, the matter will be referred for decision to the convening authority or to the court, according to whether the question arises before or after the court convenes. A request for the personal appearance of a witness referred to the convening authority or to the court for decision will be submitted in writing, together with a statement, signed by the counsel requesting the witness, containing (1) a synopsis of the testimony that it is expected the witness will give, (2) full reasons which necessitate the personal appearance of the witness, and (3) any other matter showing that such expected testimony is necessary to the ends of justice.

The trial counsel may consent to admit the facts expected from the testimony of a witness requested by the defense if the prosecution does not contest such facts or if they are unimportant. An application for the attendance of a witness may be withdrawn if the trial counsel and defense counsel enter into a stipulation as to the testimony of such a witness. See 48*d*, 154*b* (Stipulations). In connection with the subject of this paragraph, see 115*d* (3) (Warrant of attachment).

b. ***Military witnesses.***—The attendance of a person in the military service stationed at the place of the meeting of the court, or so near that travel at government expense will not be involved, will ordinarily be obtained by notification, oral or otherwise, by the trial counsel, to the person concerned of the time and place he is to appear as a witness. In order to assure the attendance of the person, the proper commanding officer should be informally advised so that he can arrange for the timely presence of the witness. If for any reason formal notice is required, the trial counsel will, through regular channels, request the proper commanding officer to order the witness to attend.

If a military person, desired as a witness, is not present at the place where the court-martial is convened and his attendance would involve travel at government expense, the appropriate superior will be requested to issue the necessary order.

The attendance of military persons not assigned to active duty should be obtained in the same manner as the attendance of civilian witnesses not in government employ. No travel order will be issued in such cases.

If practicable, a request for the attendance of a military witness will be made so that the witness will have notice at least 24 hours before starting to attend the meeting of the court.

c. ***Production of documents in control of military authorities.***—If documents which are to be introduced in evidence are in the custody and control of military authorities, the trial counsel, the court, or the convening authority will, upon proper request, take necessary action to effect the production of such documents without the necessity of further legal process.

d. ***Civilian witnesses.***—(1) *Issue, service, and return of subpoena.*—The trial counsel is authorized to subpoena as a witness, at government expense, any civilian who is to be a material witness and who is within any part of the United States, its Territories, and possessions, and can compel the attendance of such a civilian (Art. 46). As to employment of expert witnesses, see 116.

A subpoena is prepared, signed, and issued in duplicate on the forms provided by the respective departments. See appendix 17 for the form of a completed subpoena with certificate of service. If a subpoena requires the witness to bring with him a document or an exhibit to be used in evidence, each document or exhibit will be described in sufficient detail to enable the witness to identify it readily.

If practicable, a subpoena will be issued in time to permit service to be made or accepted at least 24 hours before the time the witness will have to start from home in order to comply with the subpoena.

Unless he believes that formal service is advisable, the trial counsel will mail the subpoena to the witness in duplicate, inclosing a penalty envelope bearing a return address, with the request that the witness sign the acceptance of service on the copy and return it in the penalty envelope. The return envelope should be addressed to the trial counsel of the court and not to that officer by name. The trial counsel may, and ordinarily should, include with the request a statement to the effect that the rights of the witness to fees and mileage will not be prejudiced by voluntary compliance with the request and that a voucher for fees and mileage going to and returning from the place of the sitting of the court will be delivered to him promptly on being discharged from attendance on the court.

If formal service is believed to be necessary, the trial counsel will take appropriate action with a view to timely and economical service. For example, if the witness is near the place where the court is convened, the trial counsel, or some one detailed or designated by the commanding officer of the installation, may serve the subpoena; if the witness is near some other military installation, the duplicate subpoenas may be inclosed with a suitable letter to the commanding officer of that installation; or the duplicate subpoenas may be inclosed with a suitable letter to the commander of an army area, naval district, air command, or other comparable command within which the witness resides or may be found. Any such commander will take appropriate action to complete prompt service of the subpoena by the most economical available means. Travel orders for the purpose will be issued when necessary. Service will ordinarily be made by persons subject to military law, but may legally be made by others. Service is made by personal delivery of one of the copies to the witness. The other copy, with proof of service made as indicated on the form, will be promptly returned to the trial counsel. If service cannot be made, the trial counsel will be promptly so informed. When use for it is probable, a return penalty envelope, addressed to the trial counsel of the court and not to that officer by name, may be sent to the person who is to serve the subpoena.

In occupied enemy territory, the appropriate commander is empowered to compel the attendance of a civilian witness in response to a subpoena issued by the trial counsel.

(2) *Neglect or refusal to appear.*—See Article 47 and *Warrant of attachment* below. In order to maintain a prosecution under Article 47, a person must not only be duly subpoenaed, but be paid or tendered fees, including the fee for one day of actual attendance and mileage both ways, "at the rates allowed to witnesses attending the courts of the United States" (Art. 47).

Whenever such action appears to be advisable, a finance or disbursing officer under the command of the convening authority, or the finance or disbursing officer of the same armed force as the convening authority and nearest the place where the witness is found, will, upon written request by the trial counsel or written order of the senior officer present, at once provide the trial counsel, or any other officer or person designated for the purpose, the required amount of money to be tendered or paid to the witness for one day of attendance and mileage for the journeys to and from the court. In this respect, see appropriate departmental regulations. If an officer charged with serving a subpoena pays from his personal funds the necessary fees and mileage to a witness, taking a receipt therefor, he is entitled to reimbursement.

(3) *Warrant of attachment.*—In order to compel the appearance of a civilian witness in an appropriate case, the trial counsel will consult the convening authority or the court, according to whether the question arises before or after the court has convened for trial of the case, as to the desirability of issuing a warrant of attachment (app. 19) under Article 46.

Whenever it becomes necessary to issue a warrant of attachment, the trial counsel will issue and deliver or send it for execution to an officer designated for the purpose by the commander of the proper army area, naval district, air command, or other appropriate command.

As the arrest of a person under a warrant of attachment involves depriving him of his liberty, the authority for such action may be inquired into by a writ of habeas corpus. To enable the officer to make a full return in case a writ of habeas corpus is served upon him, the warrant of attachment will be accompanied by the orders appointing the court-martial, or copies thereof; a copy of the charges in the case, including the order referring the charges for trial, each copy certified by the trial counsel to be a full and true copy of the original; the original subpoena, showing proof of service of a copy thereof; a certificate stating that the necessary witness fees and mileage have been duly tendered; and an affidavit of the trial counsel that the person being attached is a material witness in the case, that such person has willfully neglected or refused to appear although sufficient time has elapsed for that purpose, and that no valid excuse has been offered for such failure to appear.

In executing such process it is lawful to use only such force as may be necessary to bring the witness before the court. Whenever it appears that the use of force may be required or whenever travel or other orders are necessary, appropriate application to the proper commander for assistance or for orders will be made by the officer who is to execute the process.

For matters relating to habeas corpus proceedings in connection with attachments, see chapter XXIX.

116. EMPLOYMENT OF EXPERTS.—When the employment of an expert is necessary during a trial by court-martial, the trial counsel, in advance of the employment, will, on the order or permission of the court, request the convening authority to authorize such employment and to fix the limit of compensation to be paid the expert. The request should, if practicable, state the compensation that is recommended by the prosecution and the defense. Where in advance of trial the prosecution or the defense knows that the employment of an expert will be necessary, application should be made to the convening authority for permission to employ the expert, stating the necessity therefor and the probable cost. In the absence of such previous authorization, no fees, other than ordinary witness fees, may be paid for the employment of an individual as an expert witness.

117. DEPOSITIONS.—*a. **General.***—A *deposition* is the testimony of a witness, reduced to writing, under oath or affirmation, before a person empowered to administer oaths, in answer to interrogatories (questions) and cross-interrogatories submitted by the party desiring the deposition and the opposite party. *Written interrogatories* are questions, propounded by the prosecution or defense, or both, which are reduced to writing prior to submission to a witness whose testimony is to be taken by deposition on written interrogatories. The answers, reduced to writing and properly sworn to, constitute the deposition of the witness. Within the purview of Article 49*a*, a deposition taken on oral examination constitutes an *oral deposition;* a deposition taken on written interrogatories constitutes a *written deposition.*

With reference to the use of depositions in evidence, see 145*a*. Concerning the use of depositions in trials by summary courts-martial, see 79*b*. For the form of a deposition, see appendix 18.

At any time after charges have been signed as provided in Article 30, any party may take oral or written depositions unless an authority competent to convene a court-martial for the trial of such charges forbids it for good cause (Art. 49*a*). If a deposition is to be taken before charges are referred for trial, such an authority may designate officers, preferably the trial counsel and defense counsel of an existing court or their assistants, to represent the prosecution and the defense in taking the deposition of any witness. Although it is not required that officers designated to represent the parties in taking oral or written depositions be legally qualified lawyers, if the officer appointed to represent the prosecution is qualified in the sense of Article 27, the officer detailed to represent the defense must have at least equivalent qualifications under the provisions of that article. See also 30*e* and 34*d* concerning the taking of pretrial depositions.

The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition (Art. 49*b*). Notice of the taking of a deposition for the prosecution may be given to the accused, his counsel (civil or military), or the officer designated to represent the accused in the taking of the deposition. Notice of the taking of a deposition for the defense may be given to the trial counsel, an assistant trial counsel, or the convening authority.

Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths (Art. 49*c*). See 147 as to taking judicial notice of the seals of foreign notaries public with respect to the authentication of depositions taken before foreign notaries, and of the signatures of persons authorized to administer oaths under Article 136 and chapter XXII.

If the name of the person whose deposition is desired is unknown, he may be identified in the interrogatories and any accompanying papers by his office or position, for example, "Commanding Officer, Company C, 27th Infantry, Fort Adams, Vermont"; "Commanding Officer, 3101st Maintenance Squadron, Reese Air Force Base, Lubbock, Texas"; "Cashier, Commercial National Bank, Fort Leavenworth, Kansas."

In this paragraph (117), unless the context otherwise indicates, the term "trial counsel" includes a summary court-martial.

b. Depositions on written interrogatories.—Ordinarily, the side (prosecution or defense) desiring a deposition on written interrogatories will submit to opposing counsel a list of written interrogatories to be propounded to the absent witness. After opposing counsel has examined the interrogatories and has been allowed a reasonable time for the preparation of cross-interrogatories and objections, if any, the papers (with objections noted thereon) will be submitted to the convening authority or to the law officer (president of a special court-martial), depending on whether the court is in session. When the exigencies of the service render it impracticable to submit the papers to the convening authority, the matter should be referred to competent authority (Art. 49*a*) by expeditious means of communication. If submitted to the law officer (president of a special court-martial), he will examine the papers and approve the taking of the deposition or refer the papers to the convening authority if he deems the deposition should be forbidden for good cause. Additional interrogatories may be propounded on behalf of the convening authority or the court as may be necessary to elucidate the whole subject of the testimony to be given by the witness.

If the court desires the deposition of a witness it may direct counsel to submit appropriate interrogatories to the court. In any case, all parties in interest will be given full opportunity to submit cross-interrogatories and additional interrogatories, direct and cross, as desired. When the defense in a capital case submits interrogatories, cross-interrogatories may be submitted to the same extent as in a case not capital.

If the interrogatories and cross-interrogatories are submitted to the law officer (president of a special court-martial), objections on any ground known at the time may be made and passed upon at that time. But see 145*a* as to objections at the trial. A wider latitude than usual should be allowed as to leading questions.

c. ***Sending out interrogatories.***—All interrogatories are entered upon the prescribed form (app. 18) as indicated by the notes and instructions thereon. According to the circumstances, and having regard to economy, promptness, and the proper taking of the deposition, the trial counsel may send the interrogatories to the commanding officer of the military station nearest the witness; to the commander of an army area, naval district, air command, or other comparable command; to a responsible person, preferably one competent to administer oaths; to the witness himself; or, in the case of the Army or Air Force, to The Adjutant General. According to circumstances, the interrogatories will be accompanied by such of the following as are advisable or necessary: A proper explanatory letter, an addressed return penalty envelope, subpoena in duplicate, voucher for fees and mileage.

The return penalty envelope should be addressed to the trial counsel of the court and not to that officer by name. The subpoena will, but the voucher will not, be signed; but both subpoena and voucher will be completed to the extent permitted by the known facts, and the latter will be accompanied by the required number of copies of the orders appointing the court.

d. ***Action by person receiving interrogatories.***—When interrogatories are received by a military officer, he will take appropriate action with a view to the prompt and economical taking of the deposition by a competent person, the return of the deposition to the trial counsel (addressed to him as trial counsel, not by name), and the payment of the necessary fees. Subject to limitations on his authority, he may, for example, send a suitable person to the residence of the witness, or arrange by mail or otherwise for the taking of the deposition; or, in the case of a civilian witness, subpoena him or arrange for his attendance without subpoena. It may be left to the person designated to take the deposition to indicate the time and place of the taking. A civilian who performs travel to give his deposition is entitled to the same fees and expenses as if he had attended personally before the court sitting at the place the deposition is taken.

In the event that the deposition cannot be taken promptly upon receipt of the interrogatories, the person receiving the interrogatories will take immediate steps to advise the officer who requested the deposition of the delay and of the approximate date that the deposition will be taken. In all cases the taking of a deposition will be expedited.

e. ***Suggestions for person taking deposition.***—If it is necessary to subpoena a civilian witness, the person designated to take the deposition will cause the duplicate subpoena to be served personally upon the witness and will return the original to the trial counsel by an indorsement stating that the duplicate has been delivered.

If the deposition of a person in the military service is required, the officer designated to take the deposition, or the officer who causes it to be taken, shall direct the witness to appear at the proper time and place.

Before a witness gives his answers to the interrogatories they should be read and, if necessary, explained to him, or he should be permitted to read them over in order that his answers may be clear, full, and to the point. The person taking the deposition should not advise the witness how he should answer, but he should endeavor to see that the witness understands the questions, what is desired to be brought out by them, and that the answers are clear, full, and to the point.

The person taking the deposition shall administer the oath to the witness, and the reporter and interpreter, if any (see 49, 50, 114; Art. 42), and in the presence of the witness shall record or cause to be recorded the testimony of the witness. Objections made at the time of the examination shall be noted upon the deposition. Evidence objected to shall be taken and recorded subject to the objections.

When the testimony is fully transcribed the deposition will ordinarily be submitted to the witness for examination or read to him. Any changes in form or substance which the witness desires to make shall be entered by the person taking the deposition. The deposition will then be signed by the witness unless the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the person taking the deposition will, over his own signature, state the reason for the omission of the signature of the witness. The certificate of the person taking the deposition will then be executed. See appendix 18.

If a military officer takes a deposition, he will ordinarily complete and certify the voucher. When a deposition is taken by a civil officer, he should, if so requested, obtain and furnish with the return of the deposition the data necessary for the completion of the witness voucher.

f. ***Action on receipt of deposition.***—Upon receipt of the deposition the trial counsel will notify the accused or his counsel and will give the defense an opportunity to examine the deposition before the trial. The trial counsel, as the legal custodian of the deposition, is responsible that no alteration whatever is made therein.

g. ***Depositions on oral examination.***—If depositions on oral examination are to be taken before charges are referred for trial, the authority competent to convene a court for the trial of the charges may direct officers, preferably the trial counsel and defense counsel of an existing court, or an assistant trial counsel and assistant defense counsel, if any, to proceed to the residence of the witness, or other designated place, to take the deposition.

If, after charges arė referred for trial, depositions are to be taken on oral examination rather than on written interrogatories, each party concerned will indicate in a separate letter or memorandum the reasons for the deposition and the points desired to be covered in the oral examination of the witness. Subsequent to submission to and inspection by opposing counsel, the papers will be submitted to the convening authority or to the law officer (president of a special court-martial) depending upon whether the court is in session. If submitted to the law officer (president of a special court-martial), he will examine the papers and approve the taking of the deposition or refer the papers to the convening authority if it is deemed the deposition should be forbidden for good cause.

Upon receipt of the approved letters or memoranda, the commanding officer or other person to whom the papers are sent, as contemplated in subparagraph *c* above, will, whenever practicable, in addition to designating a person authorized by law to administer oaths to take the deposition, detail officers, preferably officers experienced in the duties of trial counsel and defense counsel, respectively, to represent both sides in propounding the oral questions which upon being propounded will be reduced to writing as will the answers thereto. The rules as to representation by individual counsel (48*a*, *b*) are applicable. See 145*a* as to objections.

118. CONTEMPTS.—*a.* ***General.***—The power to punish for contempt is vested in general, special, and summary courts-martial.

A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder. Such punishment shall not exceed confinement for 30 days or a fine of $100, or both (Art. 48).

The words "any person," as used in Article 48, include all persons, whether or not subject to military law, except the law officer and the members of the court. These excepted persons may be punishable as indicated in 41*b*.

The conduct described in Article 48 constitutes a direct contempt. Indirect or constructive contempts (those not committed in the presence or immediate proximity of the court while it is in session) and the conduct and the action described or referred to in Article 47 (neglect or refusal to appear or to qualify or testify as a witness, having been duly subpoenaed) are not punishable under Article 48. Having been duly subpoenaed, persons not subject to military law may be punished as provided in Article 47 for neglect or refusal to appear or refusal to qualify as a witness or to testify or to produce evidence. Persons subject to military law may be punished under Article 134 for the offenses discussed in this subparagraph.

When requested by a member or any party to the trial and when the court deems it advisable, the law officer of a general court, the president of a special court, or a summary court may warn a person that his conduct is such that his persistence therein may cause the court to hold him in contempt.

b. ***Procedure when a person is charged with contempt.***—When the conduct of a person before a court-martial constitutes a contempt within the meaning of Article 48, the regular proceedings of the court should be suspended and the person directed to show cause why he should not be held in contempt. He will be given an opportunity to explain his conduct; however, the mere insistence by the person that his language or behavior was proper does not necessarily purge him of contempt.

The preliminary question as to whether a person should be held in contempt will be disposed of in the same manner as a motion for a finding of not guilty (Art. 51*b*). Thus the ruling of the law officer (president of a special court-martial) thereon shall be made subject to the objection of any member of the court (57*d* (1)).

If there is no objection to a preliminary ruling that the person not be held in contempt, no further action thereon is required, and the court will resume its regular proceedings.

If any member objects to the ruling, the court will close and vote, as provided in Article 52, whether to sustain the ruling. The question shall be decided by a majority vote (57*f*).

If, as a result of the vote of the court, or a ruling of the law officer (president of a special court-martial) that is not objected to, there has been a preliminary determination that the person be held in contempt, the court will close to determine, by secret written ballot, whether he shall be held in contempt and, in the event of conviction, an appropriate punishment within the limits authorized by Article 48 and chapter XXV. Concurrence of two-thirds of the members present at the time the vote is taken is required both to convict and to punish a person for contempt.

Thereupon the court will open and the president will announce the holding and the punishment, if any, adjudged.

The action thus taken is properly summary, a formal trial not being required and no appeal or review (other than the automatic review by the convening authority) being authorized.

Prior to resuming the original proceedings, a record will be made in and as a part of the regular record of the case before the court, showing the facts concerning the contempt and the proceedings with reference to it; or the court may, upon the accomplishment of the record of the contempt proceedings, forthwith transmit such record to the convening authority, appropriate entries concerning such action being entered in and as a part of the regular record. For an example of proceedings in contempt, see appendix 8*b*.

In order to be effective, a punishment for contempt requires approval of the convening authority. Upon notification of the action of the court and pending formal review of the record of the contempt proceedings, the convening authority may require the person to undergo any confinement adjudged (21*d*; Art. 57*b*). The person held in contempt shall be advised, in writing, of the holding and punishment of the court and also of the action of the convening authority upon the proceedings for contempt. Copies of such communication shall be furnished to such other persons as may be concerned with the execution of the punishment; a copy shall also be included with the record of trial proper.

The court, instead of proceeding as stated above, may cause the removal of the offender, and, in a proper case, initiate his prosecution before a civil or military court.

A person held in contempt may be allowed to continue to testify or to perform his functions before the court. A witness may not be held in contempt for declining to answer a question the answer to which may tend to incriminate him; neither may an accused be held in contempt for standing mute in lieu of pleading.

c. ***Place of confinement of person held in contempt.***—The place of confinement for a civilian or military person who is held in contempt and is to be punished by confinement shall, upon approval of the punishment by the convening authority, be designated by that officer.

119. EXPENSES OF COURTS-MARTIAL.—See appropriate departmental regulations.

Chapter XXIV

INSANITY

GENERAL CONSIDERATION—INQUIRY BEFORE TRIAL—INQUIRY BY COURT—EFFECT OF MENTAL IMPAIRMENT OR DEFICIENCY UPON SENTENCE—ACTION BY CONVENING OR HIGHER AUTHORITY

120. GENERAL CONSIDERATION.—*a.* ***Insanity.***—A person is insane within the meaning of this chapter either if he lacked mental responsibility at the time of the offense as defined in 120*b*, or if he lacks the requisite mental capacity at the time of trial as stated in 120*c*.

b. ***Lack of mental responsibility.***—If a reasonable doubt exists as to the mental responsibility of the accused for an offense charged, the accused cannot be legally convicted of that offense (74*a*(3)). A person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right. The phrase "mental defect, disease, or derangement" comprehends those irrational states of mind which are the result of deterioration, destruction, or malfunction of the mental, as distinguished from the moral, faculties. To constitute lack of mental responsibility the impairment must not only be the result of mental defect, disease, or derangement but must also completely deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged. Thus a mere defect of character, will power, or behavior, as manifested by one or more offenses, ungovernable passion, or otherwise, does not necessarily indicate insanity, even though it may demonstrate a diminution or impairment in ability to adhere to the right in respect to the act charged. Similarly, mental disease, as such, does not always amount to mental irresponsibility. For example, if a person commits an assault under psychotic delusion with a view to redressing or revenging some supposed injury to his reputation, he is nevertheless mentally responsible if he knew at the time that the act was contrary to law, and if he was not acting under an irresistible impulse. On the other hand, an accused is not responsible for a particular homicide if, as a result of mental disease, he had an insane delusion that another person was in the act of attempting to kill him and he thereupon killed the supposed attacker under the delusion that it was necessary to kill the deceased to preserve his own life.

c. ***Mental capacity at time of trial.***—No person should be brought to trial unless he possesses sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense.

121. INQUIRY BEFORE TRIAL.—If it appears to any commanding officer who considers the disposition of charges as indicated in 32, 33, and 35 or to any investigating officer (34), trial counsel, or defense counsel that there is reason to believe that the accused is insane (120*c*) or was insane at the time of the alleged offense (120 *b*), that fact and the basis of the observation should be reported through appropriate channels in order that an inquiry into the mental condition of the accused may be conducted before trial. When the report indicates substantial basis for the belief, the matter will be referred to a board of one or more medical officers for their observation and report with respect to the sanity of the accused. At least one member of the board should be a psychiatrist. The board should be fully informed of the reasons for doubting the sanity of the accused and, in addition to other requirements, should be required to make separate and distinct findings as to each of the three following questions:

a. Was the accused at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to distinguish right from wrong (120*b*)?

b. Was the accused at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to adhere to the right (120*b*)?

c. Does the accused possess sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense (120*c*)?

To determine these questions the board should place the accused under observation, examine him, and conduct such further investigation as it deems necessary. On the basis of this report, further action in the case may be suspended, or the charges may be dismissed by an officer competent to appoint a court-martial appropriate to try the offense charged, or proceedings may be taken to discharge the accused from the service on the grounds of his mental disability, or the charges may be referred for trial. Such additional mental examinations may be directed at any stage of the proceedings as circumstances may require. The officer directing or requesting the mental examination of the accused will attach the report of examination to the charges if referred for trial or forwarded.

122. INQUIRY BY COURT.—*a.* ***Presumption of sanity; reasonable doubt; burden of proof.***—The accused is presumed initially to be sane and to have been sane at the time of the alleged offense. This presumption merely supplies the required proof of mental capacity and responsibility and authorizes the court to assume that the accused is sane until evidence is presented to the contrary. When, however, substantial evidence tending to prove that the accused is insane (120*c*) or was insane at the time of his alleged offense (120*b*) is introduced either by the prosecution or by the defense or on behalf of the court, then the sanity of the accused is an essential issue. If, in the light of all the evidence, including that supplied by the presumption of sanity, a reasonable doubt as to the mental responsibility of the accused at the time of the offense (120*b*) remains, the court must find the accused not guilty of that offense. If a reasonable doubt as to the mental capacity of the accused at the time of trial (120*c*) remains, the court will adjourn and transmit to the convening authority the record of its proceedings as far as had with a statement of its determination of the issue of mental capacity. Although the defense usually raises the issue of insanity by producing evidence of mental irresponsibility or lack of capacity, it is the duty of the court to call for evidence on this matter whenever there is reasonable indication that such an inquiry is warranted in the interest of justice. The burden of proving the sanity of the accused, like every other fact necessary to establish the offense alleged, is always on the prosecution, but it is not incumbent upon the prosecution to introduce any evidence tending to prove the sanity of the accused until the question of sanity becomes an issue in the case.

b. ***Procedure.***—The issue of insanity may be raised at any time while a case is before the court. The actions and demeanor of the accused as observed by the court or the bare assertion from a reliable source that the accused is believed to lack mental capacity or is mentally irresponsible may be sufficient to warrant inquiry. It should be remembered, however, that although a person who lacks mental capacity or responsibility to the extent indicated in 120 should not be tried, sanity is presumed (122*a*), and a mere assertion that a person is insane is not necessarily sufficient to impose any burden of inquiry on the court, or to raise the issue of insanity.

A request, suggestion, or motion that inquiry be had may be made by any member of the court, prosecution, or defense. The law officer of a general court-martial or the president of a special court-martial may rule, subject to objection by any member of the court and final determination by the court, as to whether an inquiry should be made (Art. 51*b*). Upon such objection a tie vote of the members upon a motion relating to the sanity of the accused is a determination against the accused (Art. 52*c*). If it is determined to make such an inquiry, priority will be given to it, and the inquiry should exhaust all reasonably available sources of information with respect to the mental condition of the accused. If it appears that the inquiry will be protracted, or if the court desires to hear expert testimony, the court may adjourn and report the matter to the appointing authority with its recommendation in the premises. Such recommendation may include in a proper case a recommendation that the accused be examined as provided in 121 and that the officer or officers conducting the examination be made available as witnesses. In his discretion the convening authority may withdraw the charges from the court as a result of a report of examination conducted under 121; or he may refer the matter to the court for its consideration subject to the provisions of 122*c*.

If the court finds the accused not mentally responsible for his acts (120*b*) it will forthwith enter findings of not guilty as to the proper charges and specifications. If it finds the accused mentally responsible for his acts, but at the time of trial lacking requisite mental capacity (120*c*), it will record such findings. In either case the proceedings so far as had will be forwarded to the convening authority. If the accused is found to be sane the trial proceeds.

If the issue of insanity is raised as an interlocutory question and the court finds the accused sane, the defense is not precluded by this finding from offering further evidence on the issue of insanity and, when all the evidence in the case has been received, the court may proceed to its findings on the guilt or innocence of the accused. In consideration of its findings upon the general issue, if the court entertains a reasonable doubt that the accused was mentally responsible for his acts, it will enter findings of not guilty as to the proper charges and specifications (120*b*).

If the convening authority disagrees with the court in its finding that the accused lacks requisite mental capacity at the time of trial (120*c*), or if the convening authority determines that the disability was temporary and that the accused has recovered his mental capacity, he may return the case to the court with instructions to reconsider its findings and, if appropriate, to proceed with the trial.

c. ***Evidence.***—The issue of the sanity of the accused is one of fact, and the modes of proof and rules of evidence with respect to this issue are, generally, those prescribed in chapter XXVII. Although the testimony of an expert on mental disorders as to his observations and opinion with respect to the mental condition of the accused may be given greater weight than that of a lay witness, a lay witness who is acquainted with the accused and who has observed his behavior may testify as to his observations and may also give such opinion as to the general mental condition of the accused as may be within the bounds of the common experience and means of observation of men.

As in the proof of other matters, evidence should be presented by the testimony of witnesses in open court, depositions (145*a*), stipulated testimony, or documentary evidence.

So much of the report of a board of medical officers or any other medical record as pertains to entries of facts or events which are properly admissible under the official records or business entry exceptions to the hearsay rule (144*b*, *c*) may be received in evidence. The opinions as to the mental condition of the accused contained in such a report are not within these exceptions to the hearsay rule. They may be received in evidence by stipulation, and in a proper case, as memoranda of past recollections recorded (146*a*). Such a report or any other pertinent matter, although not necessarily admissible in evidence, may nevertheless be examined by the law officer of a general court-martial or the president of a special court-martial for the limited purpose of determining whether further inquiry into the mental condition of the accused should be made by the court; and, in the event a ruling is objected to by any member, the court may also examine the document for the same limited purpose.

For the rules of evidence as to expert witnesses, hypothetical questions, and similar matters, see 138*e*.

123. EFFECT OF MENTAL IMPAIRMENT OR DEFICIENCY UPON SENTENCE.—In a case in which the issue of insanity is raised and the court thereafter determines the accused to be sane, it may, in arriving at its sentence, consider any evidence with respect to the mental condition of the accused which falls short of creating a reasonable doubt as to his sanity. The fact that the accused is a person of low intelligence, or that by virtue of a mental or neurological condition his ability to adhere to the right is diminished, may be a mitigating factor. On the other hand, in determining the severity of a sentence, the court may consider evidence, properly introduced, tending to show that an accused has little regard for the rights of others, such as evidence showing that he possesses homicidal tendencies.

124. ACTION BY CONVENING OR HIGHER AUTHORITY.—After consideration of the record as a whole, if it appears to the convening authority or higher authority that a reasonable doubt exists as to the sanity of the accused, he should disapprove any findings of guilty of the charges and specifications affected by such doubt and take appropriate action with respect to the sentence. Such authority will take the action prescribed in 121 before taking action on the record whenever it appears from the record of trial or otherwise that further inquiry as to the mental condition of the accused is warranted in the interest of justice, regardless of whether any such question was raised at the trial or how it was determined if raised.

Chapter XXV

PUNISHMENTS

GENERAL LIMITATIONS—MISCELLANEOUS LIMITATIONS—MAXIMUM LIMITS OF PUNISHMENTS

125. GENERAL LIMITATIONS.—In all cases of conviction, a court-martial will adjudge a legal, appropriate, and adequate punishment, due regard being had for the requirements of the code. See 76*a* and 127 for the basis of determining adequate punishment. The punishment which a court-martial may direct for an offense shall not exceed such limits as the President may prescribe for that offense (Art. 56). See also 118 (Contempts), 126 (Miscellaneous limitations), and 127 (Maximum limits of punishments).

No member of the armed forces of the United States shall be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces of the United States (Art. 12), nor, subject to the provisions as to the effective date of forfeitures set forth in 126*h* (5), shall any person while being held awaiting trial or the results of trial be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him (see Art. 13). See 18*b* (3) concerning the facilities, accommodations, treatment, and training to be afforded to accused persons being held awaiting trial or in confinement pending action by the officer authorized to order the execution of the sentence adjudged by the court. During such periods prior to the order directing execution of the sentence, an accused of those classes will not be required to observe either duty hours or training schedules devised as punitive measures, nor required to perform punitive labor, nor required to wear other than the uniform prescribed for unsentenced prisoners, except that during such periods he may be subjected to minor punishment for infractions of discipline (see Art. 13).

Punishment by flogging, branding, marking, tattooing on the body, or any other cruel or unusual punishment shall not be adjudged by any court-martial or inflicted upon any person subject to the code. The use of irons, single or double, except for the purpose of safe custody, is prohibited (Art. 55).

Courts-martial shall not impose any punishment not sanctioned by the custom of the service, such as carrying a loaded knapsack, shaving the head, placarding, pillorying, placing in stocks, or tying up by the thumbs. Loss of good conduct time will not be adjudged as punishment by a court-martial. Formal military duties, such as assignment to a guard of honor, and duties requiring the exercise of a high sense of responsibility, such as guard or watch duties, will not be imposed as punishments.

Neither confinement on bread and water or diminished rations nor solitary confinement shall be adjudged by courts-martial as punishments against Army or Air Force personnel. But see chapter XXVI.

Confinement on bread and water involves confinement in a place where the prisoner can communicate with no unauthorized person, the daily rations to consist solely of bread and water except that, while serving such a sentence, no accused shall be deprived of a full ration for a period longer than three consecutive days. Courts-martial shall exercise care and discretion in adjudging sentences of confinement on bread and water or diminished rations. Such sentences shall not be adjudged in excess of 30 days. Whenever any person is sentenced to be confined on bread and water or diminished rations, the signed certificate of a medical officer, containing his opinion as to whether serving the sentence would produce serious injury to the health of the accused, must be obtained before the sentence is ordered into execution. The certificate, which shall be attached to the record of proceedings, shall be in the following form:

> "I certify that from an examination of ______________________, and of the place where he is to be confined, I am of the opinion that the execution of the foregoing sentence will (not) produce serious injury to his health."

Solitary confinement is restraint that includes the placing of a prisoner by himself where he can communicate with no unauthorized person. Solitary confinement should be imposed upon insubordinate or recalcitrant offenders only. It shall not be imposed upon any offender in excess of 30 days.

126. MISCELLANEOUS LIMITATIONS. — *a.* ***General comments.***—The death penalty is mandatory in the case of spies (Art. 106); it is mandatory that either death or life imprisonment be adjudged for murder upon a finding of guilty under subsections (1) or (4) of Article 118. Punishment as adjudged by the court must be in conformity with the article prescribing the offense; for example, except in time of war when death or such other punishment as a court-martial may direct is authorized, the sentence of a court upon conviction of a violation of Article 85 (Desertion) must be such punishment other than death as a court-martial may direct. (The maximum penalty is governed also by the Table of Maximum Punishments except when the applicable limitations in the table are suspended.) A dishonorable discharge is by implication included in a death sentence. When life imprisonment is adjudged, the court shall also adjudge dishonorable discharge and total forfeitures.

A court-martial cannot adjudge the death penalty except for an offense made expressly so punishable by an article of the code (Art. 52*b* (1)); see 15*a* (2) for an enumeration of the particular articles. Although an offense expressly may be made punishable by death, the death penalty cannot be adjudged for that offense if the applicable limit of punishment prescribed by the President under Article 56 (127) is less than death, nor can the death penalty be adjudged if the convening authority has directed that a case be treated as not capital (see Arts. 19, 49). With reference to the limitation on the imposition of the death penalty in the case of a rehearing or new trial, see 92 and 109*g* (2).

In any case in which the sworn testimony contained in the proceedings of a court of inquiry is read in evidence pursuant to the provisions of Article 50, the maximum punishment which may be imposed for an offense committed either in time of peace or in time of war shall not extend to death or to the dismissal of an officer (see Art. 50*a*). The foregoing limitation does not apply where such testimony is read in evidence by the defense (see Art. 50*b*). Where such testimony does not enter into proof of all the specifications, the limitation applies only to those specifications into which it enters.

In adjudging the sentence of death a court-martial will not prescribe the method of execution. A sentence to death which has been finally ordered executed will be carried into effect in the manner authorized or prescribed in the service concerned.

Concerning the appropriateness of a sentence to dishonorable or bad conduct discharge, see 76*a* (Sentence—Basis for determining).

*b. **General courts-martial.***—General courts-martial may adjudge any punishment not forbidden by the code, including the penalty of death when specifically authorized by the code, and, in appropriate cases, any punishment permitted by the law of war (Art. 18).

*c. **Special and summary courts-martial.***—(1) *Special courts-martial.*—Special courts-martial may adjudge any punishment not forbidden by the code except death, dishonorable discharge, dismissal, confinement in excess of six months, hard labor without confinement in excess of three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding six months (Art. 19). Thus in adjudging a bad conduct discharge a special court-martial cannot also adjudge forfeiture of all pay and allowances, but it may in such a case properly adjudge a forfeiture of two-thirds pay per month for a period not exceeding six months. See 15*b*.

(2) *Summary courts-martial.*—Summary courts-martial may adjudge any punishment not forbidden by the code except death, dismissal, dishonorable or bad conduct discharge, confinement in excess of one month, hard labor without confinement in excess of 45 days, restriction to certain specified limits in excess of two months, or forfeiture of pay in excess of two-thirds of one month's pay (Art. 20). In the case of noncommissioned or petty officers above the fourth enlisted pay grade, summary courts-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next inferior grade. See 16*b*.

(3) *General comments.*—Special and summary courts-martial are not limited to the kinds of punishments set forth in Articles 19 and 20. See 16*b* as to the apportionment that may be required if a summary court-martial wishes to adjudge both confinement and restriction. The Table of Equivalent Punishments (127*c*) will also guide apportionment.

d. ***Officers and warrant officers.***—In general, any limitation as to the punishment that may be imposed on an officer (see Art. 1 (5)) by a court-martial is applicable in the case of a warrant officer. Except as noted hereafter, an officer cannot, by sentence of a court-martial, be reduced in rank, such as from captain to first lieutenant or from commander to lieutenant commander, nor to the grade or status of a warrant, noncommissioned, or petty officer, nor sentenced to bad conduct discharge. An officer may not be sentenced to confinement unless the sentence includes dismissal, nor may he be sentenced to hard labor without confinement in any case. Similar limitations apply in the case of a warrant officer. The separation from the service of a warrant officer by sentence of court-martial is effected by dishonorable discharge.

An officer may be punished by dismissal and a warrant officer may be punished by dishonorable discharge for an offense in violation of an article of the code, but no officer or warrant officer shall be sentenced to confinement or forfeiture of all pay and allowances unless the sentence also includes dismissal or dishonorable discharge. In no case shall a sentence to confinement in the case of an officer or warrant officer exceed the maximum prescribed for enlisted persons by the Table of Maximum Punishments.

A court-martial is not authorized to sentence an accused officer to be reduced to the ranks. However, in time of war or national emergency the Secretary of the Department concerned, or such Under Secretary or Assistant Secretary as may properly be designated, may commute a sentence of dismissal to reduction to any enlisted grade (Art. 71*b*).

e. ***Enlisted persons; prisoners sentenced to punitive discharge.***—For the maximum limits of punishment for certain offenses committed by enlisted personnel, see 127. In the case of an enlisted person of other than the lowest pay grade, a sentence which, as ordered executed or as finally approved and suspended, includes either (1) dishonorable or bad conduct discharge, whether or not suspended, (2) confinement, or (3) hard labor without confinement, immediately, upon being ordered executed or upon being finally approved and suspended, reduces such enlisted person to the lowest enlisted pay grade; however, the rate of pay of the person so reduced shall be commensurate with his cumulative service.

A court-martial is authorized to sentence an enlisted person to be reduced to an inferior or intermediate grade. But see 16*b* and 126*c* (2) concerning the limitations on the power of summary courts-martial to sentence noncommissioned or petty officers to be reduced.

If a prisoner already under a suspended sentence to dishonorable or bad conduct discharge is tried by a court-martial, dishonorable or bad conduct discharge may be adjudged as well as other appropriate penalties. However, if a prisoner has been separated from the service by dishonorable or bad conduct discharge, the adjudging of another punitive discharge would, in general, be futile. See 127*b*.

f. ***Reprimand; admonition.***—There is no restriction either as to the court which may adjudge a reprimand or admonition as punishment or as to the persons subject to the code upon whom such punishment may be imposed, but the court will not specify the terms or wording of a reprimand or admonition.

g. ***Restriction to limits.***—This form of punishment is a deprivation of privileges. There is no limitation either as to the court which may adjudge this punishment or as to the persons subject to the code upon whom it may be imposed, but it will not be adjudged in excess of two months and will not in any event operate to exempt the person on whom it is imposed from any military duty.

h. ***Forfeiture; fine; detention of pay.***—(1) *General.*—To be effective any forfeiture, fine, or detention of pay must be adjudged in express terms. Loss of pay shall be stated in dollars or dollars and cents, not in days' pay (see app. 13). In determining the amount of a forfeiture or fine, particularly a large fine, the court should consider the ability of the accused to pay.

Fines and forfeitures accrue to the United States and cannot be adjudged by a court-martial for the benefit of any individual. A court-martial has no authority to provide by stoppage, assignment, or otherwise, for the settlement of any pecuniary liability whatever, including any liability to a government agency, such as a unit fund. A sentence directing an accused to make a deposit or a contribution of pay or of other funds is illegal.

(2) *Forfeiture.*—A forfeiture is an appropriate punishment for all military personnel whatever their rank or status. Unless a total forfeiture is adjudged, a sentence to forfeiture deprives the accused of the amount expressly stated in the sentence and applies for the number of months or days expressly stated. Allowances are forfeited only when the sentence includes the forfeiture of all pay and allowances; such a penalty will be adjudged only when the accused is also sentenced to dishonorable or bad conduct discharge or to dismissal. Subject to the provisions of Article 57*a*, a forfeiture applies to pay and allowances which accrue during the enlistment, extension of enlistment, or other engagement or obligation of service in which the accused is serving at the time such a sentence is adjudged. Forfeiture of an enlisted person's deposits or of the interest thereon cannot be adjudged by sentence of a court-martial. A forfeiture may not be applied to money to be paid by an employer other than the Government. A general court-martial is not limited as to the amount of forfeiture it may adjudge, but in the case of an enlisted person it may not adjudge a forfeiture of more than two-thirds pay per month for six months unless it also sentences the accused to dishonorable or bad conduct discharge. For the limit of jurisdiction of a special or a summary court-martial to adjudge a forfeiture, see 126*c*.

In computing the maximum amount of forfeiture in dollars and cents (see Forms of sentences, app. 13) the basic pay (which is graduated according to cumulative years of service) of the enlisted person (of the reduced grade, if the sentence as ordered executed or suspended carries a reduction) plus sea or foreign duty pay (if no confinement is adjudged) will be taken as the basis. The term "basic pay" comprehends no element of pay other than the basic pay of the grade or class within grade as fixed by statute and does not include special pay for a special qualification such as that of a combat infantryman or diver, or incentive pay for the performance of hazardous duties such as flying, parachute jumping, or duty on board a submarine. (See appropriate departmental regulations as to periods which may not be counted in computing increase of pay for length of service.) Unless dishonorable or bad conduct discharge is adjudged, the monthly contribution of an enlisted person to family allowance or to basic allowance for quarters will be deducted prior to computing the net amount of pay subject to forfeiture.

The terms "forfeiture of all pay and allowances" and "to forfeit all pay and allowances," as used in 88, this chapter (XXV), and appendix

13, are construed to mean the forfeiture of all pay and allowances becoming due on and after the date a lawfully adjudged sentence is approved by the convening authority. But see 88*e* (2) (*c*) with respect to the suspension or deferment of forfeitures in certain cases. See, generally, as to forfeitures, applicable departmental regulations.

(3) *Fine.*—Whereas a forfeiture deprives the accused of all or part of his pay, a fine, which is in the nature of a judgment, makes him pecuniarily liable in general to the United States for the amount of money specified in the sentence. All courts-martial have the power to adjudge fines instead of forfeitures in all cases in which the applicable article authorizes punishment as a court-martial may direct. However, as to enlisted persons, a fine will not be adjudged unless the case falls within the provisions of Section B, 127*c* (Permissible additional punishments). In general, a court-martial has the same power to fine a prisoner of war that it has to fine a member of the armed forces. Ordinarily, a fine, rather than a forfeiture, is the proper monetary penalty to be adjudged against a civilian subject to military law. In order to enforce collection, a fine is usually accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired (see app. 13, forms 21 and 22). The total period of confinement adjudged in such a sentence shall not exceed the jurisdictional limitations of the court (15*b*, 16*b*, 126*c*).

(4) *Detention of pay.*—Detention of pay is a less severe form of punishment than a forfeiture in that the amount detained is ultimately returned to the accused when he is separated from the service. Detention of pay will not be adjudged by a court-martial except against enlisted persons.

(5) *Effective date of certain sentences.*—See Article 57. Whenever a sentence of a court-martial as approved includes a forfeiture of pay or allowances in addition to confinement not suspended, the forfeiture will apply to pay or allowances becoming due on and after the date such sentence is approved by the convening authority. However, a convening authority may defer the effective date of forfeitures in such cases by providing specifically therefor in his action. See 88*e* (2) (*c*). No forfeiture shall extend to any pay or allowances accrued before the date a sentence is approved by the convening authority.

Except as provided in the preceding subparagraph, all other sentences to forfeiture and sentences to fine or detention of pay become effective on the date the sentence is ordered executed.

i. ***Suspension from rank, command, or duty; loss of rank, promotion, numbers, or seniority.***—Suspension from rank includes suspension from command. It does not affect the right of an officer to promotion or his right to rise in files, but renders him ineligible to sit as a member of a court-martial, court of inquiry, or military board, and deprives him of privileges depending on rank, such as any priority dependent on rank in the selection of quarters.

Suspension from command merely deprives the officer of authority to exercise military command and, consequently, his authority to give orders to his juniors and to perform any duty involving the exercise of command. It does not affect his right to promotion.

Suspension from duty is analogous to suspension from command and is particularly appropriate in the case of an officer assigned to a purely administrative duty not involving the exercise of military command.

Sentences to suspension from rank, command, or duty are authorized only in the case of Army or Air Force personnel.

Sentences to loss of rank or promotion are not authorized. But see 126*d*.

Sentences to loss of numbers, lineal position, or seniority are not authorized in the case of Army or Air Force personnel. All losses of numbers will be numbers in the appropriate lineal list. For line officers it will be numbers of officers not restricted in the performance of duty. For officers of staff corps it will be numbers corresponding to line officers not restricted in the performance of duty.

j. ***Confinement at hard labor.***—Any person subject to trial by court-martial may be sentenced to confinement at hard labor. A sentence to confinement will not be adjudged in the case of an officer unless the officer is also sentenced to dismissal, nor in the case of a warrant officer unless the warrant officer is also sentenced to dishonorable discharge. Only under unusual circumstances should confinement be adjudged against an enlisted person without a sentence to forfeiture or fine. A sentence to confinement does not of itself automatically result in any fine or forfeiture of pay or allowances. The place of confinement will not be designated by the court. See, in this respect, 93.

Any period of confinement included in a sentence of a court-martial shall begin to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement (Art. 57*b*). See also 97*c* and Article 14 concerning the interruption of the execution of a sentence to confinement.

Confinement without hard labor will not be adjudged. The omission of the words "hard labor" in any sentence of a court-martial adjudging confinement shall not be construed as depriving the authority executing such sentence of the power to require hard labor as a part of the punishment (Art. 58*b*).

k. ***Hard labor without confinement.***—Hard labor without confinement will not be adjudged in excess of three months. But see 126*c* (2) concerning the jurisdiction of a summary court-martial to adjudge hard labor without confinement. It may be adjudged only in the cases of enlisted persons. Hard labor without confinement, adjudged as punishment by courts-martial, shall be performed in addition to other duties which fall to the enlisted person; and no enlisted person shall be excused or relieved from any military duty for the purpose of performing such hard labor. A sentence imposing hard labor without confinement shall be considered satisfied when the enlisted person shall have performed hard labor during available time in addition to performing his military duties. Normally, the immediate commanding officer of the accused will designate the amount and character of the labor to be performed. The daily performance of the designated hard labor before or after routine duties are completed satisfies the sentence whether the particular daily assignment requires one, two, or more hours. Upon completion of the daily assignment, the accused should be permitted to take leave or liberty to which he properly is entitled.

127. MAXIMUM LIMITS OF PUNISHMENTS.—*a.* ***Persons and offenses.***—The limits prescribed herein (127) will be applied by courts-martial in cases of enlisted persons and prisoners sentenced to punitive discharge. The mentioned limitations, though not binding upon courts sentencing officers, warrant officers, aviation cadets, cadets, midshipmen, and civilians subject to military law, except as stated in 126*d* and in Section B, 127*c*, may be used as a guide, subject to such exceptions as may be deemed warranted for determining the appropriate punishment for such persons. The maximum authorized penalties will also be applied insofar as applicable in the cases of enlisted prisoners of war.

b. ***General limitations.***—The limitations herein (127) do not exclude any other applicable limitations, for example, those set forth in 125 and 126; in particular, it should be remembered that special courts-martial cannot adjudge confinement in excess of six months nor forfeiture of pay in excess of two-thirds pay per month for six months; nor may summary courts-martial, in the case of noncommissioned or petty officers above the fourth enlisted pay grade, adjudge confinement, hard labor without confinement, or reduction except to the next inferior grade.

A court shall not, by a single sentence which does not include dishonorable or bad conduct discharge, adjudge against an accused:

Forfeiture of pay at a rate greater than two-thirds of his pay per month.

Forfeiture of pay in an amount greater than two-thirds of his pay for six months.

Confinement at hard labor for a period greater than six months—however, this limitation shall not apply in the case of a prisoner whose punitive discharge has been executed, a civilian, or a prisoner of war.

A court shall not, by a single sentence, adjudge against an accused:

Detention of pay at a rate greater than two-thirds of his pay per month.

Detention of pay in an amount greater than two-thirds of his pay for three months. See 126*h* (4).

In the execution of a single sentence not including dishonorable or bad conduct discharge, and in the execution of two or more sentences against the same accused, none of which includes dishonorable or bad conduct discharge, any forfeiture or forfeitures of pay included in the sentence or sentences shall be applied, together with other authorized stoppages or deductions, if any, excepting such as are made at the request of the accused, so as not to deprive the accused of more than two-thirds of his pay for any month. As to pay which is subject to forfeiture, see 126*h* (2).

c. ***Maximum punishments.***—The punishment stated opposite each offense listed in the Table of Maximum Punishments is hereby prescribed as the maximum punishment for that offense, and for any lesser included offense if the latter is not listed, and for any offense closely related to either if not listed. If an offense not listed in the table is included in an offense which is listed and is also closely related to some other listed offense, the lesser punishment prescribed for either the included or closely related offense will prevail as the maximum limit of punishment.

Offenses not listed in the table, and not included within an offense listed, or not closely related to either, remain punishable as authorized by the United States Code (see, generally, Title 18) or the Code of the District of Columbia, whichever prescribed punishment is the lesser, or as authorized by the custom of the service. With respect to other matters which properly may be considered in fixing punishment, see 76*a*, 123, and 154*a*.

The maximum punishment prescribed for the offense should be restricted to those cases in which, due to aggravating circumstances, the greatest permissible punishment should, in the discretion of the court, be imposed. In this connection, see 76*a* (Sentence—Basis for determining) and 88*b* (Determining what sentence should be approved).

The limitations are for each separate offense, not for each separate charge. In this connection, see 76*a* (8). For several separate and distinct offenses, even though they be alleged under the same charge, the court may, in its discretion, where the circumstances warrant such severity, adjudge in its sentence the aggregate of the limit of punishment for each separate and distinct offense. In determining the maximum punishment for two or more separate and distinct, but like, offenses against property, values as found in different specifications cannot be aggregated, as if alleged in a single specification, for the purpose of increasing the maximum punishment.

The table, which lists the maximum punishment in terms of confinement or forfeiture, or both, contains no reference to lesser forms of punishment, such as hard labor without confinement, restriction to limits, or detention of pay, which are appropriate for many minor offenses. Unless dishonorable or bad conduct discharge is adjudged, the court in its discretion may substitute at the following rates other punishments for those listed in the table:

Table of Equivalent Punishments

Confinement on bread and water or diminished rations*	Confinement at hard labor	Hard labor without confinement	Restriction to limits	Forfeiture	Detention
½ day	1 day	1½ days	2 days	1 day's pay	1½ day's pay.

*Navy or Coast Guard personnel only.

From the foregoing table it will be seen that the following punishments are equivalents: Confinement on bread and water or diminished rations for one-half day, confinement at hard labor for one day, hard labor without confinement for 1½ days, restriction to limits for two days, forfeiture of pay for one day, and detention of pay for 1½ days. For example, if an enlisted person were convicted of an offense for which the maximum punishment is forfeiture of pay for 15 days, the court could substitute other punishments, at the above indicated rates, for all or part of the 15 days' forfeiture, bearing in mind the limitations set forth in this manual. For example, it could impose forfeiture of 10 days' pay and for the remaining five days' forfeiture it could substitute five days' confinement, or 7½ days' hard labor without confinement, or 10 days' restriction, or 2½ days' confinement on bread and water or diminished rations. Similarly, if the authorized punishment for an offense were confinement at hard labor for one month and forfeiture of two-thirds of one month's pay, the court (except a summary court in the case of a noncommissioned or petty officer above the fourth enlisted pay grade) could, for example, by substitution adjudge hard labor without confinement for 15 days (1½ for 1), restriction to the limits for 40 days (2 for 1), and forfeiture of two-thirds pay for one month. In making substitutions the court must observe the limitations on its jurisdiction and on particular types of punishment. Thus, if the authorized punishment for an offense were confinement at hard labor for one month and forfeiture of two-thirds pay for one month, a summary court-martial could not adjudge additional forfeitures in lieu of any part of the confinement since it has no jurisdiction to adjudge a forfeiture of more than two-thirds of one month's pay. Similarly, if the authorized punishment for an offense were confinement at hard labor for two months and forfeiture of two-thirds pay per month for two months, no court could substitute restriction to the limits for all of the confinement (that is, 2 × 60, or 120 days) since in no event may restriction be imposed in excess of two months (60 days). Since confinement and restriction are both forms of deprivation of liberty, only one of these two punishments may be imposed in the maximum amount in any one sentence—an apportionment must be made if it is desired to adjudge both forms of punishment in one and the same sentence (16*b*). If an enlisted accused were convicted of loaning money at a usurious rate of interest to another in the military service (Art. 134), for which forfeiture of two-thirds pay per month for three months is authorized, the court could legally sentence him to hard labor without confinement for 30 days, restriction to limits for 40 days, and forfeiture of two-thirds pay for one month. The substitutions in such a case would be calculated as follows: Forfeiture of two-thirds pay per month for three months is equal to a forfeiture of 60 days' pay; for 20 of the days substitute (1½ for 1) hard labor without confinement for 30 days; for 20 of the days substitute (2 for 1) 40 days' restriction; this leaves 20 days' pay (two-thirds of one month's pay) which could be forfeited as punishment for the offense (except that a summary court, in the case of a noncommissioned or petty officer above the fourth enlisted pay grade, cannot adjudge confinement or hard labor). Substituted punishments are of importance chiefly in cases of minor offenses. By substituting additional forfeitures, or hard labor without confinement, the accused will be adequately punished but will not be prevented from performing his regular duties. The Table of Equivalent Punishments may be used by the court—but not by the convening or higher authority—in cases involving enlisted personnel only, including prisoners whose punitive discharges have not been executed.

In computing time of absence without leave, any one continuous period of absence found that totals not more than 24 hours is counted as a day; any such period found that totals more than 24 hours and not more than 48 hours is counted as two days, and so on. The hours of departure and return on different dates are assumed to be the same if both are not found.

Bad conduct discharge may be adjudged upon conviction of any offense for which dishonorable discharge is authorized in the table. In determining whether bad conduct discharge is more appropriate than dishonorable discharge, see 76*a* (6) and (7).

Immediately upon a declaration of war subsequent to the effective date of this manual, the prescribed limitations on punishment for violations of Articles 82, 85, 86, 87, 90, 113, and 115 automatically will be suspended and will not apply until the formal termination of such war or until restored by Executive order prior to such formal termination.[1]

The headings of the table and the descriptions of offenses therein are condensed for convenience of arrangement and are intended solely to identify the portions of this manual and the offenses to which they pertain (without defining any such offense). In the case of discrepancy between a heading or description of an offense in the table and any other part of this manual, such other part shall be controlling. The descriptions of offenses do not purport to define either the elements of proof of (ch. XXVIII) or the form of pleading for (app. 6) the various offenses.

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[1] By Executive Order No. 9048, 3 February 1942, the limitations upon punishments for violations of Articles of War 58, 59, and 86 were suspended, until further order, as to offenses committed after 3 February 1942. By Executive Order No. 9267, 9 November 1942, the limitations upon punishments for absence without leave from command, guard, quarters, station, or camp in violation of Article of War 61 were suspended, until further order, as to offenses committed after 1 December 1942. Executive Order No. 9683, 19 January 1946, terminated the suspensions of limitations upon punishments for violations of Articles of War 58, 59, 61, and 86 as to offenses committed after 19 January 1946, except offenses committed in occupied enemy territory. Executive Order No. 9772, 24 August 1946, terminated the suspensions of limitations upon punishments for offenses committed after 24 August 1946 in occupied enemy territory. By Executive Order No. 10149, 8 August 1950, the limitations upon punishments for violations of Articles of War 58, 59, 61, 64, 65, and 86 were suspended, until further order, as to offenses committed after 8 August 1950 by persons under the command of or within any area controlled by the Commander in Chief, Far East, or any of his successors in command.

Limitations of punishment set forth in Section 457, Naval Courts and Boards, were suspended by a state of war with Japan held to have existed from and after 7 : 55 A. M., Honolulu time, 7 December 1941. See Court-Martial Order No. 1–1942, 273. Alnav 2–46, 2 January 1946, provided, "Limitations of punishment set forth in Section 457, Naval Courts and Boards, shall, after 1 January 1946, be used as a guide in determining sentences." The quoted sentence applies to offenses committed on or after 1 January 1946. It has no application to offenses committed during the time of war prior to 1 January 1946.

Nothing contained in this manual or the order of its promulgation is to be construed as altering the effect of the foregoing Executive orders, court-martial order, or Alnav.

TABLE OF MAXIMUM PUNISHMENTS

SECTION A

Article	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
77	Principals.[1]							
78	Accessory after the fact.[2]							
79	Conviction of lesser included offense. (See 158 and Art. 79.)							
80	Attempts.[3]							
81	Conspiracy.[4]							
82	Soliciting or advising another:							
	If the offense is not committed or attempted—							
	To desert	Yes	----------	3	------	------	----------	--------
	To mutiny	Yes	----------	10	------	------	----------	--------
	If the offense is not committed—							
	To commit an act of misbehavior before the enemy.	Yes	----------	10	------	------	----------	--------
	To commit an act of sedition	Yes	----------	10	------	------	----------	--------
83	Fraudulent enlistment:							
	Procured by means of false representation concerning, or failure fully to disclose, any detail of membership in, association with, or activities in connection with, any of the organizations, associations, movements, groups, or combinations listed in the enlistment documents processed and noted at the time of enlistment.	Yes	----------	5	------	------	----------	--------
	Other cases of	Yes	----------	1	------	------	----------	--------
	Fraudulent separation	Yes	----------	5	------	------	----------	--------

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[1] Any person punishable under the code who aids, abets, counsels, commands, procures, or causes the commission of an offense punishable by the code shall, unless otherwise specifically prescribed, be subject to the maximum punishment authorized for the commission of the offense.

[2] Any person subject to the code who is found guilty as an accessory after the fact to an offense punishable by the code shall be subject to the maximum punishment authorized for such offense, except that in no case shall the death penalty be imposed nor the confinement authorized exceed more than one-half of the maximum confinement authorized for such offense, nor shall the period of confinement in any case, including offenses for which life imprisonment may be adjudged, exceed 10 years.

[3] Unless otherwise provided in this table, any person subject to the code who is found guilty of an attempt to commit any offense punishable by the code shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty be imposed nor the authorized period of confinement exceed 20 years.

[4] Any person subject to the code who is found guilty of conspiracy shall be subject to the maximum punishment authorized for the offense which is the object of the conspiracy, except that in no case shall the death penalty be imposed.

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
84	Effecting an unlawful enlistment or appointment:							
	Of a person having membership in, association with, or activities in connection with, any prohibited organization, association, movement, group, or combination listed in enlistment or appointment documents.	Yes		5				
	Other cases of	Yes		1				
	Effecting an unlawful separation	Yes		5				
85	Desertion:							
	With intent to avoid hazardous duty or to shirk important service.	Yes		5				
	Other cases of—							
	Terminated by apprehension	Yes		3				
	Terminated otherwise	Yes		2				
	Attempted desertion:							
	With intent to avoid hazardous duty or to shirk important service.	Yes		5				
	Other cases of	Yes		1				
86	Absence without leave:							
	Failing to go to, or going from, the appointed place of duty.				1		1	
	From unit, organization, or other place of duty—							
	For not more than 60 days, for each day or fraction of a day of absence.					3		2
	For more than 60 days	Yes			6			
	From guard or watch				3		3	
	With intent to abandon		Yes		6			
	With intent to avoid maneuvers or field exercises.				6		6	
87	Missing movement of ship, aircraft, or unit:							
	Through design	Yes			6			
	Through neglect		Yes		3			
89	Behaving with disrespect toward his superior officer.		Yes		6			
90	Striking, drawing, or lifting up any weapon or offering any violence to his superior officer in the execution of his office.	Yes		10				
	Willfully disobeying a lawful order of his superior officer.	Yes		5				

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
91	Striking or otherwise assaulting, while in the execution of his office, a:							
	Warrant officer	Yes		5				
	Noncommissioned or petty officer	Yes		1				
	Willfully disobeying the lawful order of a:							
	Warrant officer	Yes		2				
	Noncommissioned or petty officer		Yes		6			
	Treating with contempt or being disrespectful in language or deportment, while in the execution of his office, a:							
	Warrant officer		Yes		6			
	Noncommissioned or petty officer				3		3	
92	Violating or failing to obey any lawful general order or regulation.[5]	Yes		2				
	Knowingly failing to obey any other lawful order.[5]		Yes		6			
	Being derelict in the performance of duties.				3		3	
93	Cruelty toward or oppression or maltreatment of any person subject to his orders.	Yes		1				
94	Mutiny, sedition, failing to report, etc. (See Art. 94.)							
95	Resisting apprehension		Yes	1				
	Breaking arrest		Yes		6			
	Escaping from custody or confinement	Yes		1				
96	Releasing, without proper authority, a prisoner duly committed to his charge.	Yes		2				
	Suffering a prisoner duly committed to his charge to escape:							
	Through design	Yes		2				
	Through neglect		Yes	1				
97	Unlawful detention of another	Yes		3				
98	Unnecessary delay in disposing of a case, or failing to enforce or comply with procedural rules.		Yes		6			
99	Misbehavior before the enemy. (See Art. 99.)							
100	Subordinate compelling surrender. (See Art. 100.)							
101	Improper use of countersign. (See Art. 101.)							

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[5] The punishment for this offense does not apply in those cases wherein the accused is found guilty of an offense which, although involving a failure to obey a lawful order, is specifically listed elsewhere in this table.

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
102	Knowingly forcing a safeguard. (See Art. 102.)							
103	Captured or abandoned property, failing to secure, give notice and turn over, selling, or otherwise wrongfully dealing in or disposing of:							
	Of a value of $20 or less		Yes		6			
	Of a value of $50 or less and more than $20.	Yes		1				
	Of a value of more than $50	Yes		5				
	Looting or pillaging. (Any punishment other than death.)							
104	Aiding the enemy. (See Art. 104.)							
105	Misconduct as a prisoner. (Any punishment other than death.)							
106	Spies. (See Art. 106.)							
107	Signing any false record, return, regulation, order, or other official document.	Yes		1				
	Making any other false official statement:							
	By a noncommissioned or petty officer.	Yes		1				
	By any other enlisted person				3		3	
108	Selling or otherwise disposing of military property of the United States:							
	Of a value of $20 or less	Yes			6			
	Of a value of $50 or less and more than $20.	Yes		1				
	Of a value of more than $50	Yes		5				
	Through neglect damaging, destroying, or losing, or through neglect suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property of the United States of a value or damage:							
	Of $20 or less				3		3	
	Of $50 or less and more than $20				6		6	
	Of more than $50	Yes		1				
	Willfully damaging, destroying, or losing, or willfully suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property of the United States of a value or damage:							
	Of $20 or less	Yes			6			
	Of $50 or less and more than $20	Yes		1				
	Of more than $50	Yes		5				

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
109	Wasting, spoiling, destroying, or damaging any property other than military property of the United States of a value or damage:							
	Of $20 or less	Yes			6			
	Of $50 or less and more than $20	Yes		1				
	Of more than $50	Yes		5				
110	Hazarding or suffering to be hazarded, negligently, any vessel of the armed forces.	Yes		2				
111	Operating any vehicle while drunk or in a reckless or wanton manner:							
	Resulting in personal injury	Yes		1				
	Otherwise		Yes		6			
112	Found drunk on duty		Yes		9			
113	Misbehavior of sentinel or lookout	Yes		1				
114	Dueling	Yes		1				
115	Feigning illness, physical disablement, mental lapse, or derangement.	Yes		1				
	Intentional self-inflicted injury	Yes		7				
116	Riot	Yes		10				
	Breach of the peace				6		6	
117	Provoking or reproachful words or gestures.				3		3	
118	Murder. (See Art. 118.)							
119	Manslaughter:							
	Voluntary	Yes		10				
	Involuntary	Yes		3				
120	Rape. (See Art. 120.)							
	Wrongful carnal knowledge of a female below the age of 16 years.	Yes		15				
121	Larceny of property:							
	Of a value of $20 or less	Yes			6			
	Of a value of $50 or less and more than $20.	Yes		1				
	Of a value of more than $50	Yes		5				
	Wrongful appropriation of property:							
	Of a value of $20 or less				3		3	
	Of a value of $50 or less and more than $20.				6		6	
	Of a value of more than $50		Yes		6			
	Of any motor vehicle	Yes		2				
122	Robbery	Yes		10				
123	Forgery	Yes		5				
124	Maiming	Yes		7				
125	Sodomy	Yes		5				

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
126	Arson:							
	Aggravated	Yes		20				
	Simple, where the property is—							
	Of a value of $50 or less	Yes		1				
	Of a value of more than $50	Yes		10				
127	Extortion	Yes		3				
128	Assault				3		3	
	Assault (consummated by a battery)				6		6	
	Assault, aggravated:							
	With a dangerous weapon or other means or force likely to produce death or grievous bodily harm.	Yes		3				
	Intentionally inflicting grievous bodily harm, with or without a weapon.	Yes		5				
129	Burglary	Yes		10				
130	Housebreaking	Yes		5				
131	Perjury	Yes		5				
132	Forging or counterfeiting a signature, or making a false oath in connection with a claim, and offenses related to either of these.	Yes		5				
	Other cases:							
	When the amount involved is $20 or less.	Yes			6			
	When the amount involved is $50 or less and more than $20.	Yes		1				
	When the amount involved is more than $50.	Yes		5				
134	Abusing a public animal				3		3	
	Adultery	Yes		1				
	Assault:							
	Indecent	Yes		5				
	Upon a commissioned officer of the Air Force, Army, Coast Guard, Navy, or a friendly foreign power, not in the execution of his office.	Yes		3				
	Upon a warrant officer, not in the execution of his office.	Yes		1½				
	Upon a noncommissioned or petty officer, not in the execution of his office.		Yes		6			
	Upon any person who, in the execution of his office, is performing air police, military police, shore patrol, or civil law enforcement duties.	Yes		1				

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
134	Assault—Continued							
	With intent to commit voluntary manslaughter, robbery, sodomy, arson, burglary, or housebreaking.	Yes		10				
	With intent to commit murder or rape.	Yes		20				
	Assault (consummated by a battery) upon a child under the age of 16 years.	Yes		2				
	Bigamy	Yes		2				
	Bribe or graft, accepting, asking, receiving, offering, or promising.	Yes		3				
	Check, worthless, making and uttering:							
	With intent to deceive (given in payment of a preexisting debt).	Yes			6			
	By failing to maintain sufficient funds.				4		4	
	Debt, just, failing to pay, under such circumstances as to bring discredit upon the military service.	Yes			6			
	Disloyal statements undermining discipline and loyalty, uttering.	Yes		3				
	Disorderly:							
	In command, quarters, station, camp, or on board ship.				1		1	
	Under such circumstances as to bring discredit upon the military service.				4		4	
	Drinking liquor with a prisoner				3		3	
	Drugs, habit forming, or marihuana, wrongful possession or use.	Yes		5				
	Drunk:							
	In command, quarters, station, or camp.				1		1	
	Prisoner found				3		3	
	Under such circumstances as to bring discredit upon the military service.				3		3	
	Incapacitating self to perform duties through prior indulgence in intoxicating liquor.				3		3	
	Drunk and disorderly:							
	Aboard ship		Yes		6			
	In command, quarters, station, or camp.				3		3	
	Under such circumstances as to bring discredit upon the military service.				6		6	

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
134	False or unauthorized military or official pass, permit, or discharge certificate, making, using, altering, possessing, selling, or otherwise disposing of.	Yes		3				
	False swearing	Yes		3				
	Firearm, discharging:							
	Through carelessness				3		3	
	Wrongfully and willfully, under such circumstances as to endanger life.	Yes		1				
	Fleeing from the scene of an accident		Yes		6			
	Gambling by a noncommissioned or petty officer with a person of lower military grade.						3	
	Homicide, negligent		Yes	1				
	Impersonating an officer, warrant officer, noncommissioned or petty officer, or agent of superior authority:							
	With intent to defraud	Yes		3				
	All other cases		Yes		6			
	Indecent act or liberties with a child under the age of 16 years.	Yes		7				
	Indecent exposure of person				6		6	
	Indecent, insulting, or obscene language, communicating to a female.	Yes		1				
	Indecent or lewd acts with another	Yes		5				
	Loaning money, either as principal or agent, at a usurious or unconscionable rate of interest to another in the military service.						3	
	Mail matter in the custody of the Post Office Department or in the custody of any other agency, or not yet delivered or received: taking, opening, abstracting, secreting, destroying, stealing, or obstructing.	Yes		5				
	Mails, depositing or causing to be deposited obscene or indecent matter in.	Yes		5				
	Misprision of a felony	Yes		3				
	Nuisance, committing				3		3	
	Pandering	Yes		5				
	Parole, violation of		Yes		6			
	Perjury, statutory	Yes		5				
	Perjury, subornation of	Yes		5				
	Prisoner, allowing to do an unauthorized act.				3		3	

TABLE OF MAXIMUM PUNISHMENTS—Continued

SECTION A—Continued

Article	Offenses	Punishments						
		Dishonorable discharge, forfeiture of all pay and allowances	Bad conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—			Forfeiture of two-thirds pay per month not to exceed—	Forfeiture of pay not to exceed—
				Years	Months	Days	Months	Days
134	Public record, willfully and unlawfully altering, concealing, destroying, mutilating, obliterating, removing, or taking and carrying away with intent to alter, conceal, destroy, mutilate, obliterate, remove, or steal.	Yes		3				
	Quarantine, medical, breaking				6		6	
	Refusing, wrongfully, to testify before a court-martial, military commission, court of inquiry, or board of officers.	Yes		5				
	Restriction, administrative or punitive, breaking.				1		1	
	Sentinel or lookout:							
	Offenses against, while in the execution of his duty—							
	Behaving in an insubordinate or disrespectful manner toward.				3		3	
	Striking or otherwise assaulting	Yes		1				
	Offenses by—							
	Loitering or sitting down on duty				3		3	
	Stolen property, knowingly receiving:							
	Of a value of $20 or less	Yes			6			
	Of a value of $50 or less and more than $20.	Yes		1				
	Of a value of more than $50	Yes		3				
	Straggling				3		3	
	Threat, communicating	Yes		3				
	Unclean accouterment, arms, clothing, equipment, or other military property, found with.				1		1	
	Uniform, unclean, appearing in, or not in prescribed uniform, or in uniform worn otherwise than in manner prescribed.				1		1	
	Unlawful entry		Yes		6			
	Weapon, concealed, carrying				3		3	
	Wearing unauthorized insignia, medal, decoration, or badge.				6		6	

SECTION B

Permissible additional punishments.—If an accused is found guilty of an offense or offenses for none of which dishonorable or bad conduct discharge is authorized, proof of two or more previous convictions will authorize bad conduct discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than three months, confinement at hard labor for three months. In such a case no forfeiture shall be imposed for any period in excess of the period of confinement so adjudged. See 75*b* (2) as to limitations concerning evidence of previous convictions which may be considered; see also 126*c* (1) concerning the limitations on the power of special courts-martial to adjudge confinement and forfeitures.

If an accused is found guilty of two or more offenses for none of which dishonorable or bad conduct discharge is authorized, the fact that the authorized confinement without substitution for such offenses is six months or more will, in addition, authorize bad conduct discharge and forfeiture of all pay and allowances. But see 126*c* (1).

A fine may be adjudged against any enlisted person, in lieu of forfeitures, provided a punitive discharge is also adjudged. A fine should not ordinarily be adjudged against a member of the armed forces unless the accused was unjustly enriched by means of an offense of which he is convicted. However, a fine may always be imposed upon any member of the armed forces as punishment for contempt (Art. 48).

If an enlisted person of other than the lowest enlisted grade is convicted by a court-martial the court may, in its discretion, adjudge reduction to an inferior grade (but see 126*c* (2) concerning the limitations on summary courts-martial) in addition to the punishments otherwise authorized. Reprimand or admonition may be adjudged in any case.

Chapter XXVI

NON-JUDICIAL PUNISHMENT

AUTHORITY—POLICIES GENERALLY APPLICABLE—EFFECT OF ERRORS—PUNISHMENTS—RIGHT TO DEMAND TRIAL—PROCEDURE—APPEALS—MISCELLANEOUS

128. AUTHORITY.—*a.* ***Who may impose non-judicial punishment.***—Under the authority of Article 15, any commanding officer may, for minor offenses, without the intervention of a court-martial, impose disciplinary punishments upon officers, warrant officers, and other military personnel of his command (Art. 15*a*). This authority of a commanding officer cannot be delegated, but communications with respect thereto may be signed or transmitted by him personally or as provided for official communications in general.

The Secretary of a Department may, by regulation, place limitations on the categories of commanding officers authorized to exercise such powers (Art. 15*b*). Unless otherwise prescribed by such departmental regulation, the commanding officer of any command of an armed force may exercise power under Article 15.

In the Army and the Air Force, power under Article 15 may be exercised by commanding officers only, not by officers in charge.

An officer in charge of any unit of the Navy or the Coast Guard who is within a category authorized by the Secretary of the Department concerned to exercise such powers may, for minor offenses, impose on enlisted persons assigned to the unit of which he is in charge, such of the punishments authorized to be imposed by a commanding officer as the Secretary of the Department concerned may by regulations specifically prescribe, as provided in Articles 15*a* and *b* (Art. 15*c*). The Army and the Air Force have no "officers in charge" as that term is used in this chapter.

Officers in charge of Navy units are empowered to impose any of the disciplinary punishments authorized in 131*b* (2) and (3).

b. ***Minor offenses.***—Whether an offense may be considered "minor" depends upon its nature, the time and place of its commission, and the person committing it. Generally speaking the term includes misconduct not involving moral turpitude or any greater degree of criminality than is involved in the average offense tried by summary court-martial. An offense for which the punitive article authorizes the death penalty or for which confinement for one year or more is authorized is not a minor offense. Offenses such as larceny, forgery, maiming, and the like involve moral turpitude and are not to be treated as minor. Escape from confinement, willful disobedience of a noncommissioned officer or petty officer, and protracted absence without leave are offenses which are more serious than the average offense tried by summary courts-martial and should not ordinarily be treated as minor.

c. ***Nonpunitive measures.***—Article 15 and the provisions of this chapter do not apply to, include, or limit the use of those nonpunitive measures that a commanding officer or officer in charge is authorized and expected to use to further the efficiency of his command or unit, such as administrative admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs, and rebukes, written or oral, not intended or imposed as punishment for a military offense. Article 15 does not deprive a commanding officer or an officer in charge of the power he had prior to the enactment of that article to make use of admonition and reprimand, not as a penalty but as a purely corrective measure, more analogous to instruction than to punishment, in the strict line of his duty to create and maintain efficiency.

129. POLICIES GENERALLY APPLICABLE.—A commanding officer or officer in charge should resort to his power under Article 15 in every case in which punishment is deemed necessary and that article applies, unless it is clear that punishment under that article would not meet the ends of justice and discipline. Superior commanders should restrain any tendency of subordinate commanders to resort unnecessarily to court-martial jurisdiction for the punishment of offenders.

Although a superior commander has authority to impose disciplinary punishment upon any military subordinate of his command, it is customary for such superior commander to refer any breach of discipline on the part of an enlisted person who is a member of a subordinate unit to the attention of the immediate commanding officer of the offender. Conversely, while any immediate commanding officer has authority to impose certain disciplinary punishments upon officers and warrant officers of his command, it is generally considered better practice to refer breaches of discipline on the part of such officers and warrant officers to the attention of the superior commanding officer who is authorized to exercise summary court-martial jurisdiction. If the officer to whom information concerning a breach of discipline is forwarded as contemplated in this subparagraph lacks jurisdiction to impose the most appropriate punishment (see Arts. 15*a* (1) (*c*), 15*a* (2) (*d*)), he should forward the matter to a superior competent authority.

130. EFFECT OF ERRORS.—Any failure to comply with the regulations of this chapter will not invalidate a punishment imposed under Article 15, except to the extent that may be required by a clear and affirmative showing of injury to a substantial right of the person on whom the punishment was imposed, which right was neither expressly nor impliedly waived.

131. PUNISHMENTS.—*a.* ***Authority to limit punishments.***—The Secretary of a Department may, by regulations, place limitations on the powers granted by Article 15 with respect to the kind and amount of punishment authorized. See Article 15*b*. Unless otherwise prescribed by such departmental regulations the kinds and amounts of punishment authorized by Article 15*a* may be imposed upon the personnel of any armed force as authorized in this paragraph (131).

b. ***Authorized punishments.***—In addition to or in lieu of admonition or reprimand, one of the following disciplinary punishments may be imposed upon military personnel under Article 15:

(1) *Upon officers and warrant officers*—

(*a*) Withholding of privileges for a period not to exceed two consecutive weeks; or

(*b*) Restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or

(*c*) If imposed by an officer exercising general court-martial jurisdiction, forfeiture of not to exceed one-half pay per month for a period not exceeding one month (Art. 15*a* (1)).

(2) *Upon noncommissioned officers and petty officers*—

(*a*) Either of the punishments prescribed in 131*b* (1) (*a*) and (*b*); or

(*b*) Extra duties for a period not to exceed two consecutive weeks, and not to exceed two hours per day, holidays included; provided, that no such punishment which tends to degrade the grade of the person on whom the punishment is imposed may be imposed upon noncommissioned officers or petty officers; or

(*c*) Reduction to the next inferior grade, if the grade from which demoted is, under pertinent departmental regulations, within the promotion authority of the commanding officer imposing the punishment or within the promotion authority of any commanding officer subordinate to the one who imposes the punishment. See Article 15*a* (2).

In the Army, commanding officers below the rank of major are not authorized to impose a one grade reduction upon noncommissioned officers as punishment under Article 15. See 129.

(3) *Upon enlisted persons other than noncommissioned officers and petty officers*—

(*a*) Either of the punishments prescribed in 131*b* (1) (*a*) and (*b*); or

(*b*) Extra duties for a period not to exceed two consecutive weeks, and not to exceed two hours per day, holidays included; or

(*c*) Reduction to the next inferior grade, if the grade from which demoted is, under pertinent departmental regulations, within the promotion authority of the commanding officer imposing the punishment or within the promotion authority of any commanding officer subordinate to the one who imposes the punishment; or

(*d*) If imposed upon a person attached to or embarked in a vessel, confinement for a period not to exceed seven consecutive days; or

(*e*) If imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for a period not to exceed three consecutive days (Art. 15*a* (2)).

c. ***Execution of punishment.***—Except as otherwise prescribed, the commanding officer of the accused is charged with the execution of punishment imposed pursuant to Article 15. Punishment will be strictly enforced.

132. RIGHT TO DEMAND TRIAL.—The Secretary of a Department may, by regulations, place limitations on the powers granted by Article 15 upon the applicability of that article to an accused who demands trial by court-martial (Art. 15*b*).

Pursuant to the authority of Article 15*b*, the following departmental regulations with respect to the applicability of Article 15 to persons who demand trial by court-martial are announced by the several Secretaries:

Army and Air Force.—No disciplinary punishment under the provisions of Article 15 may be imposed upon any member of the Army or of the Air Force for an offense punishable thereunder if the accused has, prior to the imposition of such punishment, demanded trial by court-martial in lieu of such disciplinary punishment. An election to accept disciplinary punishment constitutes a waiver of the right to demand trial. A demand for trial does not require preferring, transmitting, or forwarding of charges, but punishment may not be imposed under Article 15 while the demand is in effect.

Navy and Coast Guard.—No member of the Navy or the Coast Guard may demand trial by court-martial in lieu of punishment under the provisions of Article 15.

133. PROCEDURE.—*a*. ***Army and Air Force.***—The commanding officer, after ascertaining to his satisfaction by such investigation as he deems necessary that an offense cognizable by him under Article 15 has been committed by a member of his command, will notify such member of the nature of the offense as clearly and concisely as may be possible, and will inform him that he proposes to impose punishment under Article 15 as to the offense unless trial by court-martial is demanded. He will also inform the accused that he may submit such matters as he desires either in mitigation, extenuation, or defense. In appropriate cases he will inform the accused that he is not required to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial. The notification and information will be by written communication through proper channels in the case of an officer or warrant officer and may be by written communication in any case. If the notification is in writing, the accused will be directed to acknowledge receipt of the communication by indorsement through proper channels and to include in the indorsement any demand for trial he wishes to make and any matter in mitigation, extenuation, or defense. See appendix 3 for the suggested form of such correspondence. If the notification and information is not in writing the accused will be given a reasonable time to make up his mind.

With respect to each offense as to which no demand for trial is made, the commanding officer may proceed to impose punishment.

The accused will be notified of the punishment imposed as soon as practicable and at the same time will be informed of his right to appeal. See 134. If the original communication was in writing, the notification of the punishment imposed and any reprimand or admonition which may be included in such punishment will be by indorsement on the communication carrying the original notification, and the accused will be directed to acknowledge receipt by similar indorsement and include in his indorsement the date of such receipt and any appeal he may desire to make. If the notification of the punishment is not in writing, the immediate commanding officer of the accused will be informed of the matter and given the necessary data for the record of punishment. See 135.

b. ***Navy and Coast Guard.***—Ordinarily, the commanding officer will inquire at the mast into the facts as to any minor offense allegedly committed by a member of his command. See 32 and 33*a*. There the accused will be informed of the nature of the offense alleged and will be given the warning set forth in Article 31. The same warning will be given to any witnesses called during the investigation. After giving to both the accused and the accuser (if available) an impartial hearing including any matter in mitigation, extenuation, or defense which the accused may have desired to submit, the commanding officer may impose punishment under Article 15 when necessary. At that time he shall inform the accused of his right to appeal from the punishment so imposed. See 134.

The finding of facts made by a court of inquiry or a board of investigation wherein the accused was named a party may also constitute the grounds for imposing punishment under Article 15 on a member of his command. Under such a circumstance the accused will be brought before the mast and informed of the punishment the commanding officer is imposing and of the accused's right to appeal therefrom. Forfeiture of pay imposed as disciplinary punishment shall be confirmed in writing. Notice of such forfeiture shall be given to the disbursing officer as directed by departmental regulations.

A report of the facts established at the mast or by a court of inquiry or board of investigation shall accompany any reference of a breach of discipline to a superior competent authority when such reference is made in accordance with the policy set forth in 129. If such superior competent authority is satisfied from the facts submitted to him that an offense cognizable by him under Article 15 has been committed, he may impose punishment upon the accused under that article. The accused shall be notified as soon as practicable of this punishment together with the fact of his right to appeal therefrom. Such notification shall be through proper channels and may be by written communication. If the notification is in writing, the accused will be directed to acknowledge receipt of the communication by indorsement through proper channels.

Admonitions and reprimands imposed as punishments under Article 15 shall be by written communications through proper channels in the case of an officer or warrant officer and may be by written communication in any case. All such letters of censure addressed to an officer or a warrant officer shall be in the form prescribed by pertinent regulations.

134. APPEALS.—A person punished under the authority of Article 15 who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged (Art. 15*d*). An appeal not made within a reasonable time may be rejected by the next superior authority.

An appeal will be in writing through proper channels (see 133 as to appeals by indorsement) and will include a brief signed statement of the reasons for regarding the punishment as unjust or disproportionate. The immediate commanding officer of the accused will when necessary include with the appeal a copy of the record (135) in the case. In passing upon the appeal the superior will ordinarily hear no witnesses. When justice requires such action, he will modify the punishment or set it aside, but will not increase it, and will in no case award a different kind of punishment. After having considered an appeal, he will return the papers through channels to the appellant, with a statement of the disposition of the case and with a direction to return the papers to the immediate commanding officer of the appellant for file with the record of the case.

135. MISCELLANEOUS.—*a.* ***Suspension, remission, and restoration.***—The officer who imposed the punishment, his successor in command, and superior authority shall have power to suspend, set aside, or remit any part or amount of the punishment and restore all rights, privileges, and property affected (Art. 15*d*). Application for suspension, setting aside, remission, or restoration and any action taken under this authority will be in writing and subject to the regulations as to appeals (134) as far as applicable.

Although the power to remit the unexecuted portion of a punishment may be exercised liberally, the power to set aside punishments and to restore rights, privileges, and property affected by the executed portion of a punishment should be exercised only when the authority considering the case believes that the punishment has resulted in a clear injustice—as for example when there is a reasonable doubt of the accused's guilt of the offense for which he was punished.

b. ***Records of punishment.***—As to each offense for which punishment is imposed under Article 15, the immediate commanding officer of the person on whom such punishment was imposed will cause a record to be made and filed in his office or other place, showing the offense, with date and place of commission; the punishment, with the authority that imposed it and the date the accused received the notice of the imposition of the punishment; the decision of higher authority on any appeal; any suspension, mitigation, remission, or setting aside of the punishment; and any remarks or additional data desired. See appendix 3 for the form of record. Where punishment is accomplished by written communication and indorsements, the written correspondence will constitute the record.

In addition to the record of punishment herein prescribed, such additional records will be kept, and disposition thereof made, as may be prescribed by departmental regulations.

c. ***Incidental matters.***—With reference to interposing punishment imposed under Article 15 in bar of trial, see 68*g* and Article 15*e*. With reference to showing punishment under Article 15 in extenuation, see 75*c* (4) and Article 15*e*.

Chapter XXVII

RULES OF EVIDENCE

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137. GENERAL.—The rules stated in this chapter are applicable in cases before courts-martial, including summary courts-martial. So far as not otherwise prescribed in this manual, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts or, when not inconsistent with such rules, at common law will be applied by courts-martial.

On interlocutory matters relating to the propriety of proceeding with the trial, as when a continuance is requested, or to the availability of witnesses (see 145*b*; Art. 49*d*), the court may in its discretion relax the rules of evidence to the extent of receiving affidavits, certificates of military and civil officers, and other writing of similar apparent authenticity and reliability, such as a certificate of a physician as to the illness of a witness, unless on objection to a particular writing it is made to appear that the relaxation might injuriously affect the substantial rights of the accused or the interests of the Government.

Evidence to be admissible (competent) must primarily be material and relevant. Evidence is not material when the fact which it tends to prove is not part of any issue in the case. Evidence is not relevant when, though the fact which it is intended to prove thereby is material, the evidence itself is too remote or far-fetched to have any probative value for that purpose. If evidence is held immaterial or irrelevant to the issue of guilt or innocence but is received in extenuation, it must be received solely in connection with the measure of punishment in the event of conviction.

Evidence, apparently irrelevant, may be admitted provisionally upon a statement of the party offering it that other facts later to be proved will show its relevancy, but such evidence should afterward be excluded if its relevancy is not ultimately shown. However, it is generally more desirable to require the party offering the evidence first to prove the facts showing its relevancy. For that purpose, he may be permitted temporarily to withdraw a witness or witnesses and to recall one or more witnesses who have been examined.

In the exercise of a sound discretion the court may limit the number of witnesses called by either side to testify to the same matter if, upon an offer of proof (154*c*) or otherwise, it appears that the testimony of any excluded witness would be merely cumulative. This rule especially applies to character witnesses.

138. PRESUMPTIONS; DIRECT AND CIRCUMSTANTIAL EVIDENCE; REAL EVIDENCE; TESTIMONIAL KNOWLEDGE; OPINION EVIDENCE; CHARACTER EVIDENCE; EVIDENCE OF OTHER OFFENSES OR ACTS OF MISCONDUCT OF THE ACCUSED—*a.* ***Presumptions.***—With certain exceptions, the word "presumption" as used in this manual means no more than "justifiable inference" and the word "presume" means no more than "justifiably infer." In this sense, a presumption is nothing more than a well recognized example of the use of circumstantial evidence (see 138*b*), and the weight or effect of such a presumption should be measured only in terms of its logical value. The weight to be given to a presumption of this kind will depend upon all the circumstances attending the proved facts which give rise to the inference to be drawn from such facts. The fact that evidence is introduced to show the nonexistence of a fact which might be inferred from proof of other facts, or to show the nonexistence of such other facts, does not, if the evidence can reasonably be disbelieved, necessarily destroy the logical value of the inference, but such evidence must be weighed against the inference. In making and weighing presumptions, and in considering evidence introduced in rebuttal thereof, members of courts must apply their common sense and their general knowledge of human nature and the ordinary affairs of life.

Some examples of those presumptions which are nothing more than justifiable inferences are:

A sane person may be presumed to have intended the natural and probable consequences of acts shown to have been intentionally committed by him.

When it is shown that a person was acting as a public officer, it may be presumed that he was legally in office and that he performed his duties properly.

A condition shown to have existed at one time may be presumed to have continued. Thus it may be presumed that the residence of a person remains unchanged; for instance, it may be presumed that at the time of trial a deponent continued to reside at the place where he resided at the time his deposition was taken. Also, the circumstances of a particular case may give rise to a presumption that a condition shown to have existed at one time existed for some prior period of time. For example, proof that immediately after a collision the lights on a vehicle were not burning, although in working order at that time, would support a presumption that the lights had not been turned on at the time of the collision.

Proof that a letter correctly addressed and properly stamped or franked was deposited in the mail raises a presumption of delivery to the addressee, and a similar presumption arises in regard to telegrams regularly filed with a telegraph company for transmission.

Identity of name raises a presumption of identity of person. The strength of this presumption will depend upon how common the name is and upon other circumstances.

Proof that a person was in possession of recently stolen property or a part of it raises a presumption that he stole it, and, if it is shown that the property was stolen from a certain place at a certain time and under certain circumstances, that he stole it from such place at such time and under such circumstances.

It may be presumed that one who has assumed the custody of the property of another has stolen such property if he does not or cannot account for or deliver it at the time an accounting or delivery is required.

When it is shown that as a result of his own act a person did not have sufficient funds in the bank available to meet payment upon presentment in due course of a check drawn against the bank by him, it may be presumed that at the time he uttered the check, and thereafter, he did not intend to have sufficient funds in the bank available to meet payment of the check upon its presentment in due course.

As indicated above, there are some presumptions which are exceptions to the general proposition that presumptions are merely justifiable inferences. Among these exceptions are those presumptions which relate to facts which courts are *bound* to presume in the absence of proof to the contrary. Example of such presumptions are: An accused person is presumed to be innocent until his guilt is proved beyond a reasonable doubt; and an accused is presumed to have been sane at the time of the offense charged, and at the time of trial, until a reasonable doubt of his sanity at the time in question appears from the evidence. See 148 as to the presumption of competency of witnesses.

b. ***Direct and circumstantial evidence.***—Evidence which tends directly to prove or disprove a fact in issue is called direct evidence. Evidence which tends directly to prove or disprove not a fact in issue, but a fact or circumstance from which, either alone or in connection with other facts, a court may, according to the common experience of mankind, reasonably infer the existence or nonexistence of another fact which is in issue, is called indirect or circumstantial evidence. For example, on a charge of larceny of a purse, testimony of a witness that he saw the accused take the purse from the overcoat of the owner is direct evidence that the accused took the purse, and testimony of a witness that he found the purse hidden in the locker of the accused is circumstantial evidence that the accused took it.

Circumstantial evidence is not resorted to as a secondary or inferior kind of evidence or only when there is an absence of direct evidence. It is admissible even when there is direct evidence. There is no general rule for contrasting the weight of circumstantial and direct evidence. The assertion of a trustworthy eye-witness may be more convincing than the contrary inferences that appear probable from circumstances. Conversely, one or more circumstances may be more convincing than a plausible witness. See also 74*a* (3) (Reasonable doubt) as to weighing circumstantial evidence.

c. ***Real evidence.***—Physical objects, such as clothing, jewelry, weapons, and marks or wounds on a person's body, may be received (or exhibited) in evidence if they are relevant to an issue in the case. Since it is ordinarily either impossible or impracticable to attach them to the record of trial, such exhibits should be clearly and accurately described by testimony or other means (photographs, for example) so that they may be considered properly upon appellate review.

d. ***Testimonial knowledge.***—Ordinarily, a primary qualification in a witness is that he should speak only of what he has learned through his senses. For instance, a sentry might testify that while on a sentry post at night he heard two shots and saw two persons running in the distance; but he should not proceed further and state that the shots killed a man and that one of the persons running was the accused if his information as to the effect of the shots and the identity of the persons running away is based on rumor and gossip heard the following day.

A witness may testify as to his own age, including the date of his birth.

*e. **Opinion testimony.***—It is a general rule that a witness must state facts and not his opinions or conclusions. However, if an impression upon the mind of a witness caused by his personal observation of certain facts is of a kind commonly experienced and is such that it cannot adequately be conveyed to the court by a mere recitation of the facts, he may state the impression, when relevant, even though it amounts to an opinion. Examples of such impressions are the speed of an automobile, whether a voice heard was that of a man, woman, or child, and whether or not a person was drunk. As to the expression of opinion with respect to general mental condition, see 122*c*. See also 138*f* (1) as to opinion evidence concerning character and 143*b* (1) as to opinion evidence concerning handwriting. That a witness is not able to testify with positive or absolute certainty about a fact which he has personally observed, or concerning which he is otherwise qualified to testify, goes only to the weight and not to the admissibility of whatever testimony he may be able to give with respect to that fact.

An expert witness—that is, one who is skilled in some art, trade, profession or science or who has knowledge and experience in relation to matters which are not generally within the knowledge of men of common education and experience—may express an opinion on a state of facts which is within his specialty and which is involved in the inquiry. Prior to being permitted to express his opinion, it should be shown that he is an expert in the specialty. However, proof of such qualification may be waived, either expressly or by failure to object to the reception in evidence of testimony of an expert nature.

Expert testimony may be adduced in several ways. An expert witness may be asked to state his relevant opinion, when based on his personal observation or on an examination or study conducted by him, without first specifying hypothetically in the question the data upon which the opinion is to be based. On direct or cross-examination he may be required to specify the data upon which his opinion is based, but if in the course of relating the data he refers to matters which, if themselves regarded as evidence in the case, would be inadmissible and might improperly influence the court, as when a psychiatrist testifies that his opinion as to the accused's mental responsibility was based in part on the past criminal record of the accused, the law officer (or the president of a special court-martial) should instruct the court in open session that such matters are to be considered only with respect to the weight to be given to the expert opinion. An expert witness may also be asked to express an opinion upon a hypothetical question (a question supposing a certain state of facts to exist) if the question is based on facts in evidence at the time the question is asked, or, if the court so permits in the exercise of a sound discretion, on facts which are later to be received in evidence. If evidence of such facts is not later introduced, the opinion based on them should be excluded.

An admissible opinion may be regarded as evidence of the matter to which the opinion relates.

f. Character evidence—Character of the accused; Of others.—(1) *Proof of character.*—Whenever the character of a person is admissible in a case, the opinion of a witness as to that person's character may be received in evidence if it is first shown that the witness has such acquaintance or relationship with the person in question as to qualify him to form a reliable opinion in this respect. Another mode of proving character is by adducing evidence of reputation for the kind of character involved. See also 146*b*. By "reputation" is meant the repute in which a person is generally held in the community in which he lives or pursues his business or profession. Testimony concerning the reputation of an individual in the community in which he lives or pursues his business or profession must come from a person whose knowledge of such reputation was gained from having himself been a member of the community in question. Thus, such testimony by one who has merely visited the community of an individual for the purpose of investigating his character is inadmissible. In the military service "community" includes an organization, post, camp, ship, or station.

(2) *Character of the accused.*—The general rule is that evidence that the accused has a bad moral character may not be introduced for the purpose of raising an inference of guilt.

In order to show the probability of his innocence, the accused may introduce evidence of his own good character, including evidence of his military record and standing and evidence of his general character as a moral well-conducted person and law-abiding citizen. However, he may not introduce evidence as to some specific trait of character unless proof of that trait would have a reasonable tendency to show that it was unlikely that he committed the particular offense charged. For example, evidence of good character as to the peaceableness would be admissible in a prosecution for any offense involving violence, but it would be inadmissible in a prosecution for a non-violent theft. After the accused introduces evidence as to his good character, the prosecution may, in rebuttal, introduce evidence as to his bad character. However, the character evidence in rebuttal which may properly be received will be limited by the scope of the character evidence introduced by the accused. Thus, when in a prosecution for larceny, the accused has confined his proof of good character to evidence of his good reputation for honesty, the prosecution may not show that the accused has a bad character as to general morality and conduct but will be limited, with respect to the introduction of character evidence in rebuttal, to proof of his bad character as to honesty; but if the accused has introduced evidence of his general good reputation as a moral and law-abiding person, the prosecution may show not only that the accused has a bad moral character generally but also that he has a bad character as to honesty.

If the accused takes the stand as a witness, his credibility may be attacked as in the case of other witnesses. For this purpose, the prosecution may show that the accused has a bad character as to truth and veracity. If the prosecution does introduce such evidence, the accused may show in rebuttal that his character as to truth and veracity is good. See 153*b* (2) (*a*).

(3) *Character of persons other than the accused.*—When an issue is raised as to whether the accused was acting with adequate provocation in taking the life of a person who purportedly attacked him (see 198*a*, Voluntary manslaughter) or was acting in self-defense or in defense of another (see 197, Murder, and 207*a*, Assault), it may be shown that the alleged victim of the homicide or assault had a violent character, or that he had a peaceable character. This evidence is admissible because of its relevancy to the inquiry as to whether the alleged victim was the aggressor. It may also be shown in such a case that the accused was aware of the violent or peaceable character of the alleged victim, or that the accused entertained a reasonable belief with respect to such character, for such evidence would have some bearing upon the question as to the reasonableness and extent of the apprehension of danger on the part of the accused.

See 153*b* (2) (*a*) (General lack of veracity) and 153*b* (2) (*b*) (Conviction of crime) as to the admissibility of evidence of the character of witnesses and alleged victims of sexual offenses.

g. ***Evidence of other offenses or acts of misconduct of the accused.***—The general rule is that evidence that the accused has committed other offenses or acts of misconduct is not admissible as tending to prove his guilt, for ordinarily such evidence would be useful only for the purpose of raising an inference that the accused has a disposition to do acts of the kind committed or criminal acts in general and, if the disposition thus inferred was to be made the basis for an inference that he did the act charged, the rule forbidding the drawing of an inference of guilt from evidence of the bad moral character of the accused would apply. However, if evidence of other offenses or acts of misconduct of the accused has substantial value as tending to prove something other than a fact to be inferred from the disposition of the accused, the reason for excluding the evidence is not applicable. Consequently, evidence of other offenses or acts of misconduct of the accused is admissible in the following circumstances:

(1) When it tends to identify the accused as the perpetrator of the offense charged.

Example: Two adjoining buildings are burglarized at about the same time on the same night and in a similar manner. It is permissible to show upon the trial of an accused for burglarizing one of the buildings that he was involved in the burglary of the other, for such evidence has a reasonable tendency to establish that he was involved in the burglary charged.

Example: The accused is charged with burglary. Evidence is admissible that the burglar left a pistol at the scene of the burglary and that the pistol had recently been stolen from X by the accused.

Example: X was induced to turn over a large sum of money by a peculiarly ingenious fraudulent scheme to a person whom he identifies as the accused. Evidence that the accused obtained money from Y by the same scheme is admissible.

(2) When it tends to prove a plan or design of the accused.

Example: The accused is charged with having obtained money from Z by going through a marriage ceremony with her, securing her funds on a representation that he would invest them for her, and then absconding. Evidence that he pursued the same course with W, X, and Y is admissible.

(3) When it tends to prove guilty knowledge or intent, if guilty knowledge or intent is an element of the offense charged.

Example: The accused is charged with receiving stolen goods knowing them to have been stolen. Evidence that he had received stolen goods under similar circumstances on several previous occasions is admissible.

Example: The accused is charged with knowingly passing a counterfeit coin. Evidence that the accused had on another recent occasion passed a counterfeit coin is admissible as tending to establish that on the instant occasion he knew the coin to be counterfeit.

Example: The accused is charged with larceny of property belonging to X. Evidence that he unlawfully sold the property is admissible as tending to prove that he intended permanently to deprive X of the use and benefit of the property.

But: On a charge of assaulting a person and intentionally inflicting grievous bodily harm, a former assault on a third person six months earlier and under entirely different circumstances would not be admissible, for it would have no bearing on the intent in the case charged.

(4) When it tends to prove motive.

Example: The accused is charged with attempting to desert the service. The fact that the accused had assaulted and beaten another person and was under arrest awaiting trial for that offense at the time of the alleged attempt would be admissible as evidence of a motive to attempt to desert.

Example: The accused is charged with falsification of his accounts. Evidence that he had stolen some of the goods to be accounted for is admissible if offered to show that he had a motive to falsify the accounts for the purpose of concealing the theft.

But: On a charge of falsification of accounts, evidence of falsification in a totally distinct transaction would be inadmissible, for that evidence does not bear upon the involvement of the accused in the offense charged but bears solely upon his general moral character.

(5) When it tends to refute a claim, express or implicit, made by the accused that his participation in the offense charged was the result of accident or mistake.

Example: The accused is charged with an offense involving an accusation that he administered poison to X. The accused, expressly or by implication, defends on the ground that he administered the poison to X as a result of accident or mistake. Evidence that the accused had poisoned other persons is admissible if the circumstances of the other acts tend to show that the act charged was not the result of accident or mistake.

If the accused takes the stand as a witness, his credibility may be attacked as in the case of other witnesses. For this purpose, it may be shown that he has been convicted of a crime involving moral turpitude or otherwise affecting his credibility. See 153*b* (2) (*b*).

139. HEARSAY RULE.—*a. General rule.*—A statement which is offered in evidence to prove the truth of the matters therein stated, but which is not made by the author when a witness before the court at the particular trial in which it is so offered, is heresay. This is so whether the statement consists of words, oral or written, of symbols used as a substitute for words, or of signs or other conduct offered as the equivalent of a statement. Hearsay may not be recited or otherwise introduced in evidence, and it does not become competent evidence because received by the court without objection. By this rule is meant simply that a fact cannot be proved by showing that somebody stated it was a fact. The basis of the rule is the fundamental principle, which is subject to certain well-established exceptions, that in a criminal prosecution the testimony of the witnesses shall be taken before the court, so that at the time they give the testimony offered in evidence they will be sworn and subject to cross-examination, the scrutiny of the court, and confrontation by the accused.

The fact that a given statement was made may itself be relevant. In such a case the making of the statement may be shown by any competent evidence, not for the purpose of proving the truth of what was stated but for the purpose of proving the fact that it was stated.

b. Illustrations.—Lieutenant A conducted the investigation of charges against the accused. The testimony of Lieutenant A at the trial that persons other than the accused testified to certain facts at the investigation is inadmissible to prove such facts since the testimony of Lieutenant A is hearsay if it is offered for such a purpose. However, the testimony of any person present at the investigation that he heard the investigating officer warn the accused that he was not required to make any statement and that any statement he did make might be used against him is admissible for the purpose of showing that the warning was in fact given.

A is being tried for assaulting B. In extenuation of a possible sentence, the defense presents the testimony of C that just before the assault C heard B call A a liar. The testimony of C is admissible, for it is offered to show the provocation caused by B calling A a liar and not, of course, to prove the truth of B's statement.

A is being tried for the rape of B. C is able to testify that at an identification parade B indicated (verbally or otherwise) that A was her attacker. The testimony of C is not admissible to prove that it was A who raped B, for if it were admitted for that purpose it would be hearsay. See, however, the last subparagraph of 153*a*.

A member of an armed force is being tried for disobedience of a certain order given him orally by Lieutenant C. A witness is able to testify that he heard Lieutenant C give the order to the accused. Such testimony, including testimony of the witness as to the terms of the order, is not hearsay.

An accused is being tried for the larceny of clothes from a locker. A is able to testify that B told A that he, B, saw the accused leave the quarters in which the locker was located with a bundle resembling clothes about the same time the clothes were stolen. Such testimony from A would not be admissible to prove the facts stated by B. B himself should be called as a witness.

The fact that the statement was made to an officer in the course of an official investigation does not make it admissible as an exception to the hearsay rule. For instance, if in the above example B had made his statement to Lieutenant C in the course of an official investigation by Lieutenant C, the testimony of Lieutenant C as to what B told him officially is nevertheless hearsay if it is offered to prove the truth of the matters stated by B.

B is being tried for wrongfully selling clothing. Policeman A is able to testify that while on duty as a policeman he saw the accused go into a shop with a bundle under his arm, that A entered the shop and the accused ran away and A was unable to catch him, and that the next day A asked the proprietor of the shop what the accused was doing there, and the proprietor replied that the accused sold him some clothes issued by the Government, and that he paid the accused $2.50 for them. The testimony of the policeman as to the reply of the proprietor is hearsay if it is offered to prove the facts stated by the proprietor. The fact that the policeman was acting in the line of his duty at the time the proprietor made the statement would not render the evidence admissible to prove the truth of the statement.

Unless covered by an exception, official statements made by an officer—as, for instance, by the commanding officer of a company, regiment, squadron, or ship, or by a staff officer, in an indorsement or other communication—are not excepted from the general rule of exclusion by reason of the official character of the communication or the rank or position of the officer making it. Nor is such a statement so excepted from the hearsay rule because it is among papers referred to the trial counsel with the charges.

c. ***Exceptions.***—Some of the exceptions to the hearsay rule applicable in court-martial trials are stated in 140 through 146.

140. CONFESSIONS AND ADMISSIONS; ACTS AND STATEMENTS OF CONSPIRATORS AND ACCOMPLICES.—

a. ***Confessions and admissions.***—See Article 31. A confession is an acknowledgment of guilt, whereas an admission is a self-incriminatory statement falling short of an acknowledgment of guilt. To be admissible, a confession or admission of the accused must be voluntary.

A confession or admission which was obtained through the use of coercion, unlawful influence, or unlawful inducement is not voluntary.

No hard and fast rules for determining whether a confession or admission was voluntary are here prescribed. Some instances of coercion, unlawful influence, and unlawful inducement in obtaining a confession or admission are:

Infliction of bodily harm, including prolonged questioning accompanied by deprivation of the necessities of life, such as food, sleep, or adequate clothing.

Threats of bodily harm.

Imposition of confinement, or deprivation of privileges or necessities, because a statement was not made by the accused, or threats of the same if a statement is not made by him.

Promises of immunity or clemency with respect to an offense allegedly committed by the accused.

Promises of substantial reward or benefit, or threats of substantial disadvantage, likely to induce a confession or admission from the particular accused.

During an official investigation (formal or informal) in which the accused is a person accused or suspected of the offense, obtaining the statement by interrogation or request without giving a preliminary warning of the right against self-incrimination—except when the accused was aware of that right and the statement was not obtained in violation of Article 31*b*.

Obtaining the statement in violation of Article 31.

A confession or admission of the accused is not rendered inadmissible by a promise or threat which was not an effective cause of obtaining the statement. Therefore, a promise or threat which, because of intervening circumstances, had ceased to operate upon the mind of the accused at the time he made the statement in question will not affect the admissibility of the statement, and, ordinarily, a statement of the accused need not be excluded because it happened to have been made after a promise of advantage or threat of disadvantage which was of a trivial or insubstantial nature in the light of the known consequences of making the statement.

The fact that a confession or admission, otherwise admissible, was made to an investigator during an investigation of the offense does not make the confession or admission inadmissible.

The admissibility of a confession of the accused must be established by an affirmative showing that it was voluntary, unless the defense expressly consents to the omission of such a showing, but an admission of the accused may be introduced without such preliminary proof if there is no indication that it was involuntary. If it appears that the confession or admission was not *obtained* from the accused but was made by him spontaneously (without urging, interrogation, or request, for example), the statement may be regarded as voluntary. If it does not so appear and affirmative evidence that the confession or admission was voluntary is required, the statement may not be received in evidence unless it is shown that the making of the statement was not induced by a threat, promise, or use of duress amounting to coercion, unlawful influence, or unlawful inducement. Also, in case the confession or admission was obtained by interrogation or request during an official investigation (formal or informal) in which the accused was a person accused or suspected of the offense, the statement may not be received in evidence, if affirmative evidence that it was voluntary is required, unless it is shown that through preliminary warning of the right against self-incrimination, or—if the statement was not obtained in violation of Article 31*b*—for some other reason, the accused was aware of his right not to make the statement and understood that it might be used as evidence against him. A showing of the voluntary nature of a confession or admission of the accused may consist of evidence of an oral or written declaration of the accused (itself shown to be voluntary if there is a contrary indication) in which he stated, in substance, that although he had been advised that he did not have to make the confession or admission, and that it might be used as evidence against him, he nevertheless made it freely, without being threatened with punishment or promised a reward.

The accused has the right to testify concerning the involuntary nature of his confession or admission without subjecting himself to cross-examination upon other issues in the case or upon the truth or falsity of the confession or admission. See 149*b* (1) (Cross-examination). If he desires to exercise it, he should be accorded this right before the court rules upon the admissibility of his incriminatory statement. If he so requests, he should also be given an opportunity before such a ruling is made to present other evidence with a view to showing that the statement was involuntary and to cross-examine any witness who has testified as to its voluntary nature.

The ruling of the law officer (or of the special court-martial) that a particular confession or admission may be received in evidence is not conclusive of the voluntary nature of the confession or admission. Such a ruling merely places the confession or admission before the court, that is, the ruling is final only on the question of admissibility. Each member of the court, in his deliberation upon the findings of guilt or innocence, may come to his own conclusion as to the voluntary nature of the confession or admission and accept or reject it accordingly. He may also consider any evidence adduced as to the voluntary or involuntary nature of the confession or admission as affecting the weight to be given thereto.

Although a confession or admission may be inadmissible because it was not voluntarily made, nevertheless, the circumstance that it furnished information which led to the discovery of pertinent facts will not be a reason for excluding evidence of such pertinent facts. For example, the fact that an accused charged with larceny made an involuntary and therefore inadmissible statement to the effect that he stole the missing articles and hid them in his footlocker would not require the exclusion of evidence that the articles were discovered in his footlocker, even though the discovery was made solely because of the information contained in the statement of the accused.

Mere silence on the part of an accused when questioned as to his supposed offense is not to be treated as a confession. However, if the accused is not in arrest or custody or under investigation, there are circumstances under which his failure to utter a denial of an accusation or observation that he had participated in an offense may be regarded as incriminating evidence which is admissible, as when a friend of the accused, in discussing the disappearance of a watch, says to the accused, "I saw you steal that watch last night," and the accused remains silent. In such a case it would be only reasonable to expect the accused, if he were innocent, to exclaim to his friend that he had not stolen the watch. Before such incriminating evidence can be considered against the accused, it must be corroborated by other evidence that the offense had probably been committed by someone.

If only part of a confession or admission (or supposed confession or admission) is shown, the defense by cross-examination or otherwise may show the remainder of the statement.

A voluntary oral confession or admission of the accused may be proved by the testimony of anyone who heard him make it, even though it was reduced to writing and the writing is not accounted for.

An accused cannot legally be convicted upon his uncorroborated confession or admission. A court may not consider the confession or admission of an accused as evidence against him unless there is in the record other evidence, either direct or circumstantial, that the offense charged had probably been committed by someone. Other confessions or admissions of the accused are not such corroborative evidence. Usually the corroborative evidence is introduced before evidence of the confession or admission; but the court may in its discretion admit the confession or admission in evidence upon the condition that it will be stricken and disregarded in the event that the above requirement as to corroboration is not eventually met. The corroborating evidence need not be sufficient of itself to convince beyond a reasonable doubt that the offense charged has been committed, and it need not tend to connect the accused with the offense. For example, if unlawful homicide is charged, evidence of the death of the person alleged to have been killed, coupled with evidence of circumstances indicating the probability that he was unlawfully killed, will satisfy the rule and authorize consideration of the confession or admission if it is otherwise admissible. In a case of alleged larceny or in a case of alleged unlawful sale, evidence that the property in question was missing under circumstances indicating in the first case that it was probably stolen, and in the second case that it was probably unlawfully sold, would be a compliance with the rule. The rule requiring corroboration does not apply to a confession or admission made by the accused before the court by which he is being tried, nor does it apply to statements made prior to or in pursuance of the act.

A confession or admission not made as testimony in the trial is admissible for the purpose of proving the matters stated in the confession or admission only when it was made by an accused, and it is then admissible for that purpose only with respect to the particular accused who made it. This limitation does not apply, however, if the statement is admissible to prove the matters stated therein without regard to the fact that it is a confession or admission, as when in the course of his testimony at a former trial of the accused an accomplice makes a confession damaging to the accused and the former testimony is admissible under the provisions of 145*b*.

In a prosecution for an offense in which the making of a false statement is an element (for example, perjury or making a false official statement), the fact that the accused had not been warned of his right against self-incrimination before he made the statement is not a ground for excluding evidence that the statement was made by him, even though, under the circumstances, such a preliminary warning may have been required by Article 31*b* or by some other provision of law.

b. ***Acts and statements of conspirators and accomplices.***—A statement made by one conspirator during the conspiracy and in pursuance of it is admissible in evidence against his co-conspirators as tending to prove the truth of the matter stated. It is not admissible merely because it was made while the conspiracy was existing; it must, to be admissible under this rule, have been made in pursuance of the conspiracy. When evidence of such a statement is offered, it is a preliminary question for the court whether the conspiracy existed and whether the proffered statement was made in pursuance of it. However, the court may, in the exercise of its discretion, admit the statement without preliminary proof of these matters, keeping in mind that the statement must ultimately be excluded from consideration if it is not afterwards shown to be admissible as coming within the rule under discussion or to be otherwise admissible. When the existence of a conspiracy is in issue, either on the merits or as a foundation for the admissibility of evidence, evidence of any act or other conduct of each of the alleged conspirators tending to prove the conspiracy, including evidence of statements and other verbal conduct offered for a purpose other than as tending to prove the truth of the matters stated, is admissible.

It is immaterial that the offense charged is the doing of an act rather than a conspiracy to do the act. For example, if X is charged with having murdered A, evidence that X, Y, and Z conspired to murder A and that Z did the killing is admissible. If the conspiracy is shown to have existed, any statement of Y or of Z made in pursuance of the purpose to kill A is admissible in evidence against X.

The agreement constituting the conspiracy may be, and usually is, proved by circumstantial evidence. It is scarcely ever possible to prove a formal or express agreement. The agreement constituting the conspiracy may be a tacit one. Evidence of the conduct, including the statements, of an accomplice of the accused or of any person acting in concert with him is, for the purpose of determining its admissibility, treated as if it were evidence of the conduct of a co-conspirator.

When two or more accused are tried at the same time, evidence of a statement made by one of them which would be admissible against him if he were tried alone but would not be admissible against another of the accused if he were being tried alone may be received in evidence, but in such event the law officer (or the president of a special court-martial) should instruct the court in open session that the statement can be considered as evidence only against the accused who made it. See also 153*b* (2) (*c*) as to the instruction which should be given in the case of inconsistent statements of an accomplice.

In this connection it is to be remembered that evidence of the conviction of an accomplice of the accused of the offense charged against the accused cannot be received against the accused as tending to prove that the offense charged was committed or that the accused participated in it.

141. STATEMENTS MADE THROUGH INTERPRETERS.— As a general rule, a statement made through an interpreter may be proved only by the testimony of the interpreter or by other evidence of the statement itself, and may not be proved by evidence of the interpreter's translation. However, as an exception to this general rule, such a statement may be proved by evidence of the interpreter's translation if the interpreter was acting as the agent of the person who made the statement and such person is the accused, or is a co-conspirator or accomplice of the accused and made the statement in pursuance of the common venture, or is a witness and proof of the statement would tend to impeach his credibility. Evidence of the translation may be furnished by the testimony of any person who heard the statement being interpreted, or by a writing which contains the translation and which is admissible because acknowledged by the person who made the statement or for some other reason. If the person who made the statement could have rejected the services of the individual who acted as interpreter, or in any manner agreed to his employment or to the accuracy of the translation, it may be considered that the interpreter was the agent of such person.

When otherwise admissible, testimony given through a duly sworn interpreter at the trial at which it is offered may properly be received in evidence. If given at another trial, testimony through an interpreter may be proved by the record of the trial or by other evidence of the interpretation only when such evidence is admissible under the above-mentioned agency exception to the general rule or when, in accordance with the provisions of 145*b*, the testimony is competent as former testimony and the interpreter, as well as the witness at the former trial, is not reasonably available as a witness. Subject to the limitations prescribed in Article 49, a deposition taken through a duly sworn interpreter may be read in evidence to the same effect that it could be if the deponent had testified without the aid of an interpreter. See 145*a*.

142. DYING DECLARATIONS; SPONTANEOUS EXCLAMATIONS; FRESH COMPLAINT; STATEMENTS OF MOTIVE, INTENT, OR STATE OF MIND OR BODY.—***a. Dying declarations.***—In trials for homicide (murder, manslaughter, negligent homicide) the dying declaration of the alleged victim concerning the circumstances of the act which induced his dying condition, including the identity of the person or persons who caused the injury, is admissible in evidence to prove such circumstances. The reason for the rule is that the dying statement of the victim would be unavailable otherwise and was based presumably on a moral obligation to tell the truth. The declaration must have been made while the victim was in extremity and under a sense of impending death, although it is not necessary to show that the victim asserted that he was under this impression if that fact is otherwise established. There is no requirement that death immediately follow the declaration, but if it was made while the victim had a hope of recovery it is not admissible under this exception to the hearsay rule even though he died shortly thereafter. If not obtained by duress or under circumstances indicating that the declarant may have been misled, a dying declaration is admissible even though it was made in answer to leading questions or upon urgent solicitation. The declaration may be by spoken words or intelligible signs or it may be in writing. A declaration which was made by a person who would not have been competent as a witness may not be received in evidence under this exception to the hearsay rule, nor may a dying declaration or part thereof be received in evidence even though the declarant would have been competent as a witness, if for any reason it would have been inadmissible as testimony given on the witness stand by the declarant.

Dying declarations are admissible both in favor of and against the accused. Such declarations should be received in evidence with caution since they are often made under circumstances of mental and physical debility and are not subject to the usual tests of veracity.

b. ***Spontaneous exclamations.***—An utterance concerning the circumstances of a startling event made by a person while he was in such a condition of excitement, shock, or surprise, caused by his participation in or observation of the event, as to warrant a reasonable inference that he made the utterance as a spontaneous and instinctive outcome of the event, and not as a result of deliberation or design, is admissible as an exception to the hearsay rule to prove the truth of the matters stated. Such a spontaneous exclamation may be proved by any competent evidence, and the testimony of a person who heard the utterance being made, but who was not present at the occurrence which gave rise to it, is competent for this purpose. In a prosecution for assault by stabbing, for example, the testimony of a person who did not see the attack, but who came upon the alleged victim thereafter, that such victim, while visibly in agony as a result of the wounds received, cried out "John Smith stabbed me!" is admissible to prove the exclamation of the victim, and the exclamation, thus shown to be spontaneous, is admissible as tending to prove that the stabbing was done by a man named John Smith.

A spontaneous exclamation is admissible even though the person who made it is not dead or otherwise unavailable as a witness in the case, and even though, because of infancy or mental infirmity, for example, he is or would have been incompetent as a witness. However, a spontaneous exclamation may not be received in evidence if, under rules other than those concerning the competency of witnesses, the utterance would have been inadmissible as testimony given on the witness stand by the person who made it, as when it appears that the utterance could not have been or was not in fact based upon the personal observation of its author, or when the person who made the utterance was the spouse of the person against whom it is to be used and the privilege prohibiting the use of one spouse as a witness against the other is applicable and has not been waived (see 148*e*). It is not essential to the admissibility of a spontaneous exclamation that the event which called it forth be the act charged.

Spontaneous exclamations are sometimes called res gestae, but that term is often used with respect to other kinds of admissible utterances whether or not their admissibility depends upon an exception to the hearsay rule. For instance, the term has been applied to statements which are received in evidence merely to prove the fact that they were made (see examples in 139*b*). The term res gestae cannot properly be used to describe any particular rule of evidence.

c. ***Fresh complaint.***—In prosecutions for sexual offenses, such as rape, carnal knowledge, sodomy, attempts to commit such offenses, assault with intent to commit rape or sodomy, and indecent assaults, evidence that the alleged victim of such an offense made complaint thereof within a short time thereafter is admissible. This evidence is to be restricted to proof that the complaint (including the identification of the offender) was made, a description of the details of the offense given during the course of making the complaint being inadmissible under this rule. Evidence of fresh complaint, as such, is received solely for the purpose of corroborating the testimony of the victim and not for the purpose of showing directly the truth of the matters stated in the complaint. However, the complaint, as well as a description of the details of the offense related during the course of making the complaint, may be received in evidence to prove directly the truth of the matters stated if admissible under the spontaneous exclamation exception to the hearsay rule (142*b*).

d. ***Statements of motive, intent, or state of mind or body.***—If a statement made under circumstances not indicative of insincerity discloses a relevant and then existing motive, intent, or state of mind or body of the person who made the statement, evidence of the statement is admissible for the purpose of proving the motive, intent, or state of mind or body so disclosed. However, evidence of a statement of a person other than the accused may not be received under this rule when the statement would amount to an accusation that the accused committed the act charged or that the act charged had been committed, even though the statement would incidentally disclose a relevant motive, intent, or state of mind or body of the person who made the statement. For example, in a case in which A is charged with having murdered B by poisoning him, and A claims that the poison was intentionally administered by B himself, the absence of a suicidal frame of mind on the part of B may not be shown by evidence that shortly before his illness B stated, "I'm afraid A is putting poison in my food," or, "I'm afraid someone is putting poison in my food." Had B's statement been, "I intend to buy a farm when I retire next year," that statement would have been admissible to show that B had not intended to take his own life.

The admissibility of evidence of a statement disclosing motive, intent, or state of mind or body constitutes an exception to the hearsay rule only when the disclosure depends upon the statement being accepted as true. If the disclosure results from the mere fact that the statement was made, as when the mental condition of a person is indicated by his statement that he is the Emperor Napoleon, the admissibility of evidence of the statement does not constitute an exception to the hearsay rule. Whatever the theory of admissibility, a statement of motive, intent, or state of mind or body may be proved by the testimony of anyone who heard it being made or by other competent evidence.

It should be noted that the above rule (that relating to the admissibility of evidence of statements of motive, intent, or state of mind or body) does not authorize proof of a person's motive, intent, or state of mind or body by evidence of a disclosure thereof made in another person's statement. Thus, in a homicide case, evidence of a statement of the victim to the effect that he was going to remain at home on the night of the homicide because the accused intended to visit him is not admissible to show the intention of the accused to visit the victim and thus raise an inference that the accused kept the appointment. However, if a statement made by one person would tend to supply or produce, rather than disclose, a relevant motive, intent, or state of mind or body on the part of another, evidence that the statement was made may be received to show its probable effect on the other (see the illustration in the second paragraph of 139*b*).

Evidence of a person's statement as to his memory or belief of a fact, offered as tending to prove the fact remembered or believed, is not admissible under the rule pertaining to evidence of statements of motive, intent, or state of mind or body.

143. DOCUMENTARY EVIDENCE—PROVING CONTENTS OF A WRITING; AUTHENTICATION OF WRITINGS.—*a. **Proving contents of a writing.***—(1) *General rule.*—A writing is the best evidence of its own contents, and the original thereof must be introduced to prove its contents. When this rule, known as the best evidence rule, applies, the proper method of proving the contents of a writing is to present evidence authenticating (143*b*) the original of the document and then to introduce the original in evidence. However, a carbon copy of a document, as complete as the ribbon copy in all essential respects, including relevant signatures, if any, or an identical copy made by photographic (see 144*e*) or other duplicating process, is considered to be a duplicate original and to be admissible equally with the original. An objection to the introduction of secondary evidence (testimony, or a copy not considered a duplicate original) as proof of the contents of a writing is waived by a failure to object, on the ground of its secondary nature, to the reception of the secondary evidence. Such a waiver, however, adds nothing to the weight to be given to, or the evidentiary nature of, the particular writing so received. Thus, if the original of a particular document would have been inadmissible even if no objection had been made to its reception in evidence (for instance, a document which is offered to prove the truth of the matters stated therein but which is not within any of the exceptions to the hearsay rule), it would be error to admit testimony relating to its contents or a copy thereof simply because no objection was made on the ground of the best evidence rule.

(2) *Exceptions.*—If it is shown that an admissible writing has been lost or destroyed, or that for some other reason it cannot be produced, or (if a party other than the accused desires to introduce its contents) that it is in the possession of the accused, the contents may be proved by an authenticated copy or by the testimony of a witness who has seen the writing.

When the originals consist of admissible writings which are so numerous or bulky that they cannot conveniently be examined by the court, and the fact to be proved is the general result of the whole collection, and that result is capable of being ascertained by calculation, as, for instance, if the fact to be proved is the balance shown by account books, the calculation may be made by some competent person and the result of the calculation testified to by him. In such cases it must first be shown to the court that the writings would be admissible but are so numerous or bulky that they cannot conveniently be examined by the court; that the fact to be proved is the general result of the whole collection; that the result is capable of being ascertained by calculation; that the witness is a person skilled in such matters and capable of making the calculation; that he has examined the whole collection and has made the calculation; and that the opposite party has had access to the books and papers from which the calculation was made. Opportunity will be afforded the opposite party to cross-examine the witness upon the books and papers in question, and to have such of them (or properly authenticated copies thereof) as are necessary for this purpose produced in court.

In the case of an official record required by law, regulation, or custom to be kept on file in a public office, a duly authenticated copy is admissible to the extent that the original would be, without first proving that the original has been lost or destroyed and without otherwise accounting for the original. The term "public office" includes a military office, even though only military personnel, or certain military personnel, have access thereto. Only an exact copy of the official record is admissible under this exception to the best evidence rule although it may consist merely of an extract of those portions material to the case. The copy may be made by photographic process. A certified résumé of the text of an official record is generally inadmissible. However, if the head of an executive or military department or independent governmental agency, or his deputy for the purpose, certifies that it would be detrimental to the public interest to divulge the source of official knowledge of a certain fact or event or to divulge the text of a record thereof, a certificate by him, or by his deputy, setting forth a résumé of an official record of such fact or event kept under the authority of the department or agency concerned is prima facie evidence of the fact or event as set forth in the résumé.

A certificate by the chief custodian of the personnel records of the armed force concerned, or by one of his deputies or assistants, that a duly qualified fingerprint expert on duty as such in his office has compared certain attached fingerprints with the fingerprints on file of a person described by name, military status, and service number, and that the attached fingerprints and the fingerprints with which they were compared have been found to be those of one and the same person, is admissible to establish, prima facie, the identity and military status of the person whose fingerprints are attached. A similar certificate executed by the custodian, or by one of his deputies or assistants, of the fingerprint records of any department, bureau, or agency of the United States shall be equally admissible. The attached fingerprints (those which had been forwarded for the purpose of comparison) may be identified as those of a particular individual by the testimony of the person who took them or by someone who was present at the time they were taken.

A duly authenticated certificate or statement signed by a custodian of official records, or by his deputy or assistant, that after diligent search no record or entry of a specified tenor is found to exist in the records of his office is admissible as evidence that the records of his office contain no such record or entry. It is also proper to prove that certain official records contain no record or entry of a purported fact or event by the testimony of the custodian of the official records in question, or by the testimony of his deputy or assistant. If a purported fact or event is of a kind required by law, regulation, or custom to be recorded, proof that there is no official record thereof may be received as evidence that the fact did not exist or that the event did not occur.

b. ***Authentication of writings.***—(1) *General.*—A writing that is not authenticated may not properly be received in evidence, but proof of authenticity can be waived by a failure to object, on the ground of lack of such proof, to the admissibility of the writing. A writing may be authenticated by any competent proof that it is genuine—is in fact what it purports to be. It may be authenticated by a certificate or other written statement only when such certificate or statement is admissible as an exception to the hearsay rule. See (2) in this subparagraph (Official records), 145*a* (Depositions), and 147*b* (Foreign law).

In proving the genuineness of letters the rule is that the arrival by mail of a reply purporting to be from the addressee of a prior letter duly addressed and mailed is sufficient evidence of the genuineness of the reply to justify its introduction into evidence. A similar rule prevails as to telegrams purporting to be from the addressee of a prior telegraph or telephone message. Such a reply, however, is not to be considered as evidence of the genuineness of the letter or other message to which the reply was purportedly made.

Whenever the genuineness of the handwriting of any person may be involved, as when it is desired to introduce into evidence against the accused a pay voucher or check purportedly signed by him or an admissible photostatic copy thereof, any admitted or proved (by evidence raising a reasonable inference of genuineness) handwriting of such person shall be competent evidence as a basis for comparison by witnesses or by the court to prove or disprove the genuineness of the handwriting in question. When there is a question as to who wrote or signed a particular document, the opinion of any person acquainted with the handwriting of the supposed writer to the effect that the document was or was not written or signed by him is admissible in evidence. A person is deemed to be acquainted with the handwriting of another person when he had, at any time, seen that person write, or when he has received documents purporting to have been written by that person in answer to documents written by himself, or under his authority, and addressed to that person, or when in the ordinary course of business documents purporting to have been written by such person have been actually submitted to him. If a party does not contest the general authenticity of a proffered document, a failure by such party to object on the ground that the genuineness of a particular signature appearing thereon has not been shown may be regarded as a waiver by him of that objection.

If a part of a writing appears to have been altered after the execution of the writing, neither that part nor any part dependent for its admissibility upon the altered part may be received in evidence over objection, for a purpose other than to prove the act of altering the writing, unless the alteration is satisfactorily explained.

Before the court rules upon an objection to the reception in evidence of a document, the opposing party, upon request, should be given an opportunity to support the objection by presenting evidence and by cross-examining any witness who has testified concerning the document.

(2) *Official records.*—(*a*) *General.*—As in the case of other writings, an official record, or copy thereof, must be properly authenticated, although proof of authenticity can be waived. Official records are generally proved by duly authenticated copies thereof. Originals may be authenticated in the same manner as copies, except that if an attesting certificate is used it should indicate that the document is an original. In the case of a copy of an official record, an "attesting certificate" is a certificate or statement signed by the custodian of the record, or by his deputy or assistant, indicating that the paper in question is a true copy of the original and that the signer is acting in an official capacity as the keeper of the original, or as his deputy or assistant. An "authenticating certificate" is a signed certificate or statement indicating that the signer of the attesting certificate is the official he purports to be, or that the attesting certificate is in proper form, or containing words of like import.

A custodian of an official record is a person who has custody thereof by authority of law, regulation, or custom, that is, a person in whose office the record is officially on file. An attestation in the form of an attesting certificate, when duly authenticated, is prima facie sufficient to show such official custody in the keeper. Some attesting certificates may be authenticated by taking judicial notice of the signature thereto (see 147*a*). Others require authentication by seal, accompanying certificate, or other proof of genuineness, according to whatever procedure is adequate to authenticate the official record attested.

(*b*) *Military records.*—A copy of an official record of the Department of Defense, of any department, agency, bureau, branch, force, command, or unit thereunder, and of the Coast Guard and its subordinate commands or units, may be authenticated by the seal, inked stamp, or other identification mark of such department, agency, bureau, branch, force, command, or unit, or by an attesting certificate. Thus, "A true (extract) copy of the original on file [in the office of the Adjutant General (First Infantry Division) (First Air Division)] [in the office of the Commanding Officer, (USS) (USCG__) ____________________]: /s/ John Smith, [Maj, Ass't Adjutant General, (First Infantry Division) (First Air Division)] [LCDR, (U. S. Navy) (U. S. Coast Guard), Executive Officer, (USS) (USCG__) ____________________]," would be, prima facie, a sufficient authentication of a copy of an official record on file in the office mentioned in the attesting certificate.

(*c*) *United States records.*—A copy of an official record of the United States, of its Territories and possessions and their political subdivisions, and of the District of Columbia, may be authenticated by:

> Any indication under the great seal of the United States, or the seal of the Territory or possession in which the record is kept, or the seal of the District of Columbia in the case of records kept under its authority, that the document is a true copy;
>
> Any authentication provided for by any law of the United States, including rules of criminal procedure for the United States district courts made pursuant thereto, or by any law of the Territory or possession or political subdivision thereof in which the record is kept, or of the District of Columbia in the case of records kept under its authority;
>
> An attesting certificate, under the seal of a court of record existing by authority of a law of the United States and located in the district, Territory, or possession in which the record is kept, or existing by authority of the Territory or possession or political subdivision thereof in which the record is kept, or of the District of Columbia in the case of records kept under its authority;
>
> An attesting certificate, under the seal of the department, bureau, agency, office, or court in which the record is kept, or under the seal of a public officer or office having a seal of office and having supervision over the department, bureau, agency, or office in which the record is kept, or by an attesting certificate without further authentication in the case of records kept under the authority of any governmental agency of the United States;
>
> An attesting certificate, accompanied by an authenticating certificate signed by and under the seal of any public officer having a seal of office and having duties by authority of the United States in the district, Territory, or possession in which the record is kept, or having duties in, and by authority of, the Territory or possession

or political subdivision thereof in which the record is kept, or having duties in, and by authority of, the District of Columbia in the case of records kept under its authority.

(*d*) *State records.*—A copy of an official record of any State of the United States, including its political subdivisions, may be authenticated by:

Any indication, under the state seal of such State, that the document is a true copy;

Any authentication provided for by the law of such State or of the political subdivision thereof in which the record is kept, or by any law of the United States, including rules of criminal procedure for the United States district courts made pursuant thereto;

An attesting certificate, under the seal of a court of record existing by authority of such State or of the political subdivision thereof in which the record is kept;

An attesting certificate, accompanied by an authenticating certificate signed by and under the seal of any public officer having a seal of office and having duties in, and by authority of, such State or the political subdivision thereof in which the record is kept.

(*e*) *Foreign records.*—A copy of an official record of any foreign country or political subdivision thereof may be authenticated by:

Any indication, under the great seal of such foreign country, that the document is a true copy;

Any authentication provided for by the law of such foreign country or of the political subdivision thereof in which the record is kept, or by any law of the United States, including rules of criminal procedure for the United States district courts made pursuant thereto;

An attesting certificate, accompanied by an authenticating certificate signed by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent, or by any officer in the foreign service of the United States, stationed in the foreign country in which the record is kept, under the seal of his office;

An attesting certificate, under the seal of a public officer or office of the foreign country or political subdivision thereof in which the record is kept, or accompanied by an authenticating certificate signed by such an officer, which attesting certificate under seal or authenticating certificate is accompanied by a certificate or statement signed by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent, or by any officer in the foreign service of the United States, stationed in the foreign country in which the record is kept, under the seal of his office, indicating that the foreign seal or authenticating certificate is genuine, or containing words of like import.

A copy of an official record of any foreign country or political subdivision thereof in which armed forces of the United States are stationed or through which they are passing or which is occupied by armed forces of the United States or any ally thereof may be authenticated by an attesting certificate accompanied by an authenticating certificate signed by the commander of the armed force concerned, or his deputy for the purpose. If such authenticating commander, or his deputy, is not an officer of the armed forces of the United States, his authenticating certificate shall be accompanied by a certificate or statement signed by a commissioned officer of the armed forces of the United States indicating that the signer of the authenticating certificate is who and what he purports to be.

(*f*) *Miscellaneous.*—Copies of foreign, and other, official records and their attesting and authenticating certificates or statements, if written in a language other than English, should be translated through the testimony of one having knowledge of the language concerned. However, any translation accompanying and made a part of any attesting or authenticating certificate or statement may be received in evidence subject to objection by counsel.

In addition to the methods of authentication set forth in the above provisions of 143*b* (2), an official record or a copy thereof may be authenticated by the testimony of any person, based on his personal knowledge, to the effect that the proffered document is a particular official record, or that the document is a true and exact copy of such official record, as the case may be. Also, if an attesting or authenticating certificate is authenticated by competent testimony it need not be authenticated by seal or an accompanying certificate as might otherwise be required by the above provisions of 143*b* (2). An attesting or authenticating certificate which is authenticated by competent testimony and signed by a proper person may be considered a sufficient prima facie authentication of the official record, or copy thereof, to which the certificate relates.

A certificate or statement signed by a custodian of official records, or by his deputy or assistant, that after diligent search no record or entry of a specified tenor is found to exist in the records of his office can be authenticated in the same manner as a certificate attesting a copy of an official record kept in the office concerned. A certificate by the head of an executive or military department or independent governmental agency, or by his deputy, setting forth a résumé of an official record the source or text of which should not be disclosed can be similarly authenticated.

144. OFFICIAL WRITINGS; OFFICIAL RECORDS; BUSINESS ENTRIES; LIMITATIONS AS TO THE ADMISSIBILITY OF OFFICIAL RECORDS AND BUSINESS ENTRIES; MAPS AND PHOTOGRAPHS.—*a. **Official writings.***—It is to be borne in mind that the mere fact that a document is an official writing or report does not in itself make it admissible in evidence for the purpose of proving the truth of the matters therein stated. An official writing may be admitted in evidence for this purpose only when it comes within one of the recognized exceptions to the hearsay rule.

b. ***Official records.***—An official statement in writing, whether in a regular series of records or a report, made as a record of a certain fact or event is admissible as evidence of the fact or event if made by an officer or other person in the performance of an official duty, imposed upon him by law, regulation, or custom, to record such fact or event and to know, or to ascertain through appropriate and trustworthy channels of information, the truth of the matter recorded. It may be presumed, prima facie:

> That a person who had such a duty performed it properly.
>
> That a foreign or domestic record which reflects a fact or event required to be recorded by law, regulation, or custom was made by a person so required to make it; provided that the record is authenticated as an original or copy, in accordance with the rules set forth in 143*b* (2), by an attesting certificate, itself duly authenticated, or by a seal or identification mark alone, when permissible, or is otherwise shown by competent evidence to be officially on file in a public office.
>
> That foreign or domestic records which are thus authenticated or shown to be officially on file in a public office and which reflect facts or events of a kind generally recorded by public officials of civilized states and nations, such as births, deaths, and marriages, were made by persons who had an official duty by law, regulation, or custom to record such facts or events and to know, or to ascertain through appropriate and trustworthy channels of information, the truth thereof.

See 213*a* as to the meaning of "custom."

Examples of military records containing entries which may be admissible under this exception to the hearsay rule are enlistment papers, physical examination papers, outline-figure and fingerprint cards, morning reports, guard reports, service records, logs, unit personnel diaries, and individual equipment records.

If admissible under this exception, an official record is not subject to objection on the ground that it was compiled from notes or memoranda or from other official records.

c. ***Business entries.***—Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible as evidence of the act, transaction, occurrence, or event if made in the regular course of any business and if it was the regular course of such business to make such memorandum or record at the time of the act, transaction, occurrence, or event, or within a reasonable time thereafter. All other circumstances of making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility. The term "business," as used in this paragraph, includes business, profession, occupation, and calling of every kind.

A business entry is properly authenticated by proof that it came from the custody of and had been made by or deposited in an office whose business it was to record the act, transaction, occurrence, or event set forth in the entry. It is not necessary that a business entry be authenticated by the person who made it or that an authenticating witness have personal knowledge that the entry was correct. If not themselves made as business entries, copies and written compilations of business entries are generally subject to objection on the ground that they are secondary evidence (143*a*). See 145*a* as to the use of copies of business entries in depositions.

An entry made in the usual course of business which satisfies the requirements of this exception to the hearsay rule is admissible even though such entry was not made or kept pursuant to any law or regulation. Thus tally sheets used by a depot warehouse as a convenient business method of keeping account of military stores passing through it are admissible although no regulation, directive, or order required that such tally sheets be made or kept.

d. ***Limitations as to the admissibility of official records and business entries.***—Official records are admissible in evidence only insofar as they relate to a "fact or event," and the admissibility of business entries is limited to a memorandum or record of "any act, transaction, occurrence, or event" appearing therein. Records or entries of "opinion" are not admissible under either exception to the hearsay rule. The word "event" may be considered to include the words "act," "transaction," and "occurrence," and to be included within the meaning of the word "fact." Properly speaking, a statement of opinion cannot be considered a statement of fact, for an opinion is an impression upon the mind brought about by an accumulation of facts, whereas a fact is a phenomenon or event by which the human senses are directly activated without the intervention of conscious mental deliberation. Nevertheless, it is often difficult as a practical matter to draw the line between what is opinion and what is fact, and some assertions based on trained observation which, strictly speaking, might be considered statements of opinion so closely approximate statements of fact as to permit the law to place them in the latter category rather than in the former and to admit a record of them in evidence without appreciable risk of doing an injustice because of lack of opportunity to cross-examine. Thus, if otherwise competent as official records or business entries, entries in a physician's report setting forth a diagnosis of an illness of a kind which can readily be diagnosed by the medical profession, and in an autopsy report setting forth the opinion of the pathologist as to the physical cause of death (as when he concludes that death was caused by a certain disease, by a certain poison, or by a gunshot wound), are admissible in evidence to prove the illness and the physical cause of death, respectively. On the other hand, entries in a report of a board of medical officers (psychiatrists) as to the mental condition of a certain individual are not admissible to prove such mental condition, for a diagnosis of a mental condition involves opinion to such a degree as to require that those making such a diagnosis be subject to cross-examination. See 122*c*.

In the case of an official record, the recording official must not only have had a duty to make an entry as to a certain fact or event but must, in addition, have had a duty to know or ascertain the truth of the matter set forth in the record. There exists a somewhat correlative rule in the case of business entries. It is not sufficient that a particular entry was made in the regular course of conduct which had some relationship to business if it was not made in the regular course of a business. "Regular course" of business must find meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business. Because of these limitations, and the opinion limitation, a pathologist's entry in an autopsy report as to whether the death was caused by homicide, accident, or suicide (as distinguished from his entry as to the physical cause of death—for instance, that the death resulted from a gunshot wound) is not admissible to prove such cause of death under either the official record or the business entry exception to the hearsay rule. The above mentioned limitations apply in such a case because a law or regulation requiring the pathologist to make an entry as to his finding in this respect would not fix upon him the duty of ascertaining the truth of circumstances surrounding the occurrence of death reported to him by others but not observed by him during the course of his examination, and it is obvious that it is not the regular course of the business of a pathologist to make such an entry based on that kind of data; and if the entry was based not on reported matters but on an examination of the body by the pathologist the opinion thus expressed by him would be of a kind which should be open to the test of cross-examination.

Neither the official record nor the business entry exception to the hearsay rule renders admissible in evidence writings or records made principally with a view to prosecution, or other disciplinary or legal action, as a record of, or during the course of an investigation into, alleged unlawful or improper conduct. Thus neither the report of an investigating officer nor an accompanying summary of the testimony of a witness on a preliminary investigation of a charge is competent evidence of the truth of the facts therein stated. See, however, 140*a* (Confessions and admissions) and 153*b* (2) (*c*) (Inconsistent statements). On the other hand, since it is not the function of a pathologist performing an autopsy to determine that the death was caused by any particular person or even that the death was the result of unlawful conduct, his entry in the autopsy report as to the identification of the individual upon whose body the autopsy was performed, as to the physical facts found to exist with respect to the corpse and as to the physical cause of death do not come within this limitation, and such entries may be admissible under either the official record or business entry exception to the hearsay rule. Official record entries in morning reports, logs, unit personnel diaries, and service records as to absence without leave, and in the above records and in guard reports as to escape from confinement, are not inadmissible because of this limitation, for such entries are made in a routine manner principally for the purpose of reflecting day to day events which affect the strength in personnel of the reporting organization or which indicate the military proficiency of the individual reported upon. The admissibility of depositions and of records of trial (see 145 concerning their use as evidence) is not affected by this limitation.

A news account of an incident is not admissible to prove the incident under either of these exceptions to the hearsay rule, for with respect to these exceptions a news account is not a record or memorandum.

e. ***Maps and photographs.***—Maps, photographs, X-rays, sketches, and similar projections of localities, objects, persons, and other matters are admissible when verified by any person, whether or not he made or took them, who is personally acquainted with the locality, object, person, or other thing thereby represented or pictured and is able from his own personal knowledge or observation to state that they actually represent the appearance of the subject matter in question. Such documents are also admissible when they come within either the official record or business entry exception to the hearsay rule.

Fingerprints are admissible when they come within either the official record or the business entry exception to the hearsay rule or are in any manner properly verified, but evidence concerning the comparison of fingerprints must emanate from persons skilled in comparing fingerprints.

145. DEPOSITIONS; FORMER TESTIMONY.—*a.* ***Depositions.***—See Article 49. For procedure in taking depositions see 117. Any case referred to a special court-martial for trial under 15*a* (1) is a case "not capital" within the meaning of Article 49. Under the provisions of Article 49*f*, a case in which the death penalty is authorized by law but is not mandatory for an offense of the kind charged is not capital whenever the convening authority shall have directed that the case be treated as not capital. Upon a rehearing or new trial thereof a case in which the death penalty is authorized by law but is not mandatory for an offense of the kind charged is not capital within the meaning of Article 49 if the sentence adjudged upon the original hearing or trial was other than death. Although an offense is punishable by death under the article denouncing it, such offense is not legally so punishable, and therefore is not capital, if the applicable limit of punishment prescribed by the President under Article 56 is less than death. In a trial upon several specifications, the proceedings as to each constitute a separate "case."

Testimony taken by deposition may be introduced by the defense in capital cases if otherwise admissible. If the defense calls for testimony to be taken by deposition in a capital case, the deponent may be cross-examined by written interrogatories, or otherwise, as fully as a deponent in a case not capital. With the express consent of the defense made or presented in open court, but not otherwise, the court may admit competent deposition testimony not for the defense in a capital case. When otherwise admissible, deposition testimony not for the defense may be admitted without the consent of the defense in a case not capital tried with a capital case if such testimony is not material to the capital case, or (when it is material to the capital case) if the cases do not involve the same criminal transaction and the law officer instructs the court in open session that such testimony is not to be considered as material to the capital case.

If only a part of a deposition is offered in evidence by a party, the other party (including the prosecution in a capital case) may require him to offer all of it which is relevant to the part offered. If the party at whose instance a deposition has been taken decides not to offer it or offers only a part of it, the other party may offer the deposition or the parts not offered, except that, in a capital case, the prosecution may not thus offer a deposition or parts thereof without the express consent of the defense made or presented in open court.

A deposition will ordinarily be read to the court by the side on whose behalf it is being offered. At the reading, objections may be made to the introduction of the evidence which it contains in the same way that they would be made if the evidence was offered in the usual manner. Unless the ground of an objection is one which might have been obviated or removed if presented at the time interrogatories were submitted to the opposite party or to the court or at the time the deposition was taken, a failure to object at that time to the competency of the deponent, or to questions contained in written interrogatories or otherwise propounded, or to the admissibility of evidence contained in the deposition, shall not be considered a waiver of the objection. It may be shown that an objection actually was made even though the objection is not noted in the body of the deposition, but in the absence of such a showing it may be assumed that no objections were made other than those noted. In case the court shall have ruled on an objection at the time interrogatories were submitted to it for acceptance, it shall again pass upon the objection at the time the deposition is read, if then requested to do so, without regard to its previous ruling.

The same rules as to the competency of witnesses and the admissibility of evidence apply to the introduction of evidence taken by deposition that apply to the introduction of other evidence before the court, except that a wider latitude than usual should be allowed as to leading questions put to a deponent upon written interrogatories. Also, whenever a business entry is properly authenticated by the testimony of a witness taken on deposition, a copy of the business entry, identified as such by the witness, may be substituted for the original. Such copy (marked by the person taking the deposition in such a manner as to indicate that it is the copy identified by the witness) will accompany and be part of the deposition and shall be admissible in evidence equally with the original. A failure to object to the introduction of a deposition on the ground that it was not taken on reasonable notice or before a proper officer, or on the ground that it does not appear that the deponent is unavailable as a witness, may be regarded as a waiver of that objection. After being read to the court, a deposition will be properly marked as an exhibit with a view to incorporation in the record.

The limitations upon the use of deposition testimony mentioned above and in Article 49 do not apply with respect to statements of deponents which are admissible under some rule of evidence other than that authorizing the introduction of depositions. Any such statement, for example, a voluntary confession or admission of the accused made while a deponent, or an inconsistent statement of a witness similarly made, may be proved by the deposition in which it appears (if that document is properly receivable as an official record of the statement or otherwise as a writing) or by other competent evidence.

b. ***Former testimony.***—When at any trial by court-martial including a rehearing or new trial, it appears that a witness who has testified in either a civil or military court at a former trial of the accused in which the issues were substantially the same (except a former trial shown by the objecting party to be void because of lack of jurisdiction) is dead, insane, too ill or infirm to attend the trial, beyond the reach of process, more than one hundred miles from the place where the trial is held, or cannot be found, his testimony in the former trial, if properly proved, may be received by the court if otherwise admissible, except that the prosecution may not introduce such former testimony of a witness unless the accused was confronted with the witness and afforded the right of cross-examination at the former trial and unless, in a capital case, the witness is dead, insane, or beyond the reach of process. Cases considered "not capital" in 145*a* are also considered "not capital" with respect to the admissibility of former testimony. A failure to object to the introduction of testimony given at a former trial of the accused on the ground that the issues in the former trial were not substantially the same, or on the ground that the accused was not confronted with the witness and afforded the right of cross-examination at the former trial, or on the ground that it does not appear that the witness is now unavailable, may be considered a waiver of that objection.

The testimony of a witness who has testified at a former trial may be proved by the official or other admissible record of the former trial, by an admissible copy of so much of such record as contains the testimony, by an official or otherwise admissible stenographic or mechanical report of the testimony, or by a person who heard the witness give the testimony and who remembers all of it, or the substance of all of it, that is relevant to the topic in question. See 141 as to proving former testimony given through an interpreter.

If otherwise admissible, a deposition taken for use or used at a former trial by court-martial is admissible in a subsequent trial of the same person on the same issues.

The limitations upon the use of former testimony noted above do not apply with respect to statements made at a former trial, or at any trial, which are admissible under some rule of evidence other than that authorizing the introduction of former testimony. Any such statement, for instance, a voluntary confession or admission of the accused or an inconsistent statement of a witness, may be proved by an admissible record or report of the trial at which it was made or by other competent evidence.

As to the use of a record of the proceedings of a court of inquiry, see Article 50. The effect of the words "not capital and not extending to the dismissal of an officer" as used in Article 50 is that if the prosecution uses the record of a court of inquiry to prove part of the allegations in a specification, neither death nor dismissal may be adjudged as a result of a conviction under that specification, but other lawful punishment may be. The introduction of the record of a court of inquiry by the defense shall not affect the punishment which may be adjudged. A person's "oral testimony cannot be obtained" in the sense of Article 50 if the person is dead, insane, too ill or infirm to attend the trial, beyond the reach of process, or cannot be found.

146. MEMORANDA; AFFIDAVITS.—*a.* ***Memoranda.***—Memoranda may be used to supply facts once known but now forgotten, or to refresh the memory. Memoranda are therefore of two sorts. *First*, if the witness does not actually remember the facts or events but relies on the memorandum exclusively, as in the case of a witness using an old diary, then the witness must be able to state that the memorandum accurately represented his knowledge at the time of its making. It is not necessary that he should himself have made the memorandum if he can state from his present memory that at a time when his recollection was fresh as to the facts or events recorded he read the memorandum and found it to be correct, or must have done so. If the certainty of the witness that a particular memorandum represents his past recollection rests upon his normal habit or course of business in making or perusing memoranda similar to the memorandum in question, this may be considered a sufficient foundation for the use of the memorandum. *Second*, if the witness can actually remember the facts or events and merely needs the memorandum to refresh his memory or a part of it, then the above limitation as to the connection of the witness with the memorandum do not apply. Thus a witness may have his memory refreshed by showing him, while he is on the stand, a newspaper account of an incident in which he was involved. However, the court should see to it that no attempt is made to use a memorandum to impose a false memory on the witness under the guise of refreshing it.

A memorandum of the first sort is admissible. If the memorandum is of the second sort the witness will testify without the memorandum itself being admitted in evidence.

The memorandum used must, on demand, be shown to the opponent for purposes of inspection and cross-examination.

b. ***Affidavits.***—The general rule is that affidavits are not admissible as evidence of the truth of the matters therein stated, for they are hearsay assertions. However, the defense, if it so desires, may introduce affidavits or other written statements as to the character of the accused and as to matters in extenuation of a possible sentence. See also the exception in the second paragraph of 137.

147. JUDICIAL NOTICE; FOREIGN LAW.—*a.* ***Judicial notice.***—Certain kinds of facts need not be proved by the formal presentation of evidence, for the court is authorized to recognize their existence without such proof. This recognization is termed judicial notice.

The principal matters of which a court may take judicial notice are as follows:

> The ordinary divisions of time into years, months, weeks, and other periods; general facts and laws of nature, including their ordinary operations and effects; and general facts of history.
>
> The political organization and the chief officials of the Government of the United States, of its Territories and possessions, of the District of Columbia and of the several States of the United States; and the signatures and duties of persons attesting official documents, or copies thereof, kept under the authority of any governmental agency of the United States.
>
> The treaties of the United States, and executive agreements between the United States and any State of the United States or between the United States and any foreign country; and current political or de facto conditions of war and peace.
>
> The organic and public laws, including regulations having the force of law, the seals of courts of record, and the seals of public offices and officers of the United States, of its Territories and possessions and their political subdivisions, of the District of Columbia, and of the several States of the United States and their political

subdivisions; and military custom in an armed force of the United States.

The public laws, or regulations having the force of law, in effect in any country or territory or political subdivision thereof occupied by armed forces of the United States; the law of nations, including the law of war; the common law.

The great seals or seals of state of the United States, its Territories and possessions, the District of Columbia, the several States of the United States, and foreign countries; the seals of notaries public, foreign and domestic.

The organization of the Department of Defense, of the departments, agencies, bureaus, branches, forces, commands, and units thereunder, and of the Coast Guard and its subordinate commands and units; and, with respect to any of the foregoing, their location, their seals, inked stamps, or other identification marks, and the regulations and official publications pertaining thereto or issued thereby, including general orders, bulletins, circulars, price lists, and court-martial orders.

The signatures of the Judge Advocates General and their deputies and assistants, and of the chief custodians of the personnel records of the various armed forces and their deputies and assistants; the signatures of the custodians of fingerprint records of any department, bureau, or agency of the United States, and the signatures of their deputies and assistants; the signature of any person authorized to administer oaths by Article 136 or by any of the provisions of law referred to in chapter XXII, when affixed to a deposition or any sworn document to indicate the execution of such authority; the signatures of persons authenticating records of the proceedings of military courts and commissions of the armed forces of the United States; the signatures and duties of persons attesting official documents, or copies thereof, of the Department of Defense, of any department, agency, bureau, branch, force, command, or unit thereunder, or of the Coast Guard or any of its subordinate commands or units; the signatures and duties of officers of the armed forces of the United States authenticating foreign official records, or copies thereof, pursuant to the authority contained in 143*b* (2) (*e*).

The principle of judicial notice does not prohibit the court from receiving additional evidence of a fact of which it is authorized to take judicial notice, and, if not satisfied of the fact of which it is asked to take judicial notice, it may resort to any authentic source of information. For example, if the terms of a circular of the Department of the Army, Navy, or Air Force are material, the court may send for a copy of the circular.

It is customary for the side desiring the court to take judicial notice of a given fact to ask the court to do so, at the same time presenting any available authentic source of information on the subject. For instance, when counsel asks the court to take judicial notice of the law of a State of the United States pertaining to a certain matter, he should furnish the court with an official publication of that State, such as a statute book or book of reports, or, if an official publication is not available, with a reliable textbook or other writing setting forth such law. If the court, in taking judicial notice, makes use of a document, the court should state for the record what matters it has thus judicially noticed, and (unless the document is a statute of the United States, an executive order of the President of the United States, or an official publication of the Department of Defense, the Department of the Army, Navy, or Air Force, or the Headquarters of the Marine Corps or Coast Guard) the document, or pertinent extracts therefrom, should be included in the record of trial as an exhibit.

b. ***Foreign law.***—With the exception of the law in effect in a country or territory occupied by armed forces of the United States, a court-martial cannot take judicial notice of foreign law or foreign regulations having the force of law. Such law must be proved like any other fact. There are several ways of doing this. *First*, the laws of a foreign country, or political subdivision thereof, may be proved by the testimony of a person who is familiar with them through education or experience. Such a person may testify as to the content and construction of the foreign law in question or as to the correctness or genuineness of a text or official publication setting forth such law. Insofar as his testimony may relate merely to the content of a foreign law as set forth in the published statutes or regulations of the foreign country concerned (as distinguished from his testimony concerning the construction of any such law already properly in evidence or concerning customary law), it is subject to objection based on the best evidence rule. See 143*a*. If such an objection is made, the statute or regulation in question should be proved by an official publication thereof. *Second*, foreign laws may be proved by official publications in which they are set forth, such as statute books, books of reports, journals or gazettes published by the foreign country concerned, or pamphlets or circulars published by a military department or any governmental agency of the United States. Official publications of a military department or any governmental agency of the United States setting forth foreign law are not subject to objection on the ground of the best evidence rule. *Third*, treatises, textbooks, or commentaries, written by professionally qualified persons, may be received as evidence of foreign law to the same extent as parol testimony.

Official legal publications are considered to be official records and may be authenticated (and proved by duly authenticated copies) in the same manner as may other official records (143*b* (2)). However, it may be presumed, prima facie, that publications containing evidence of foreign law which purport to be official publications or texts written by professionally qualified persons, and which are obtained from a public library or other public office, are what they purport to be. This presumption applies whether or not the public library or other public office from which such a publication is obtained is located in the country the law of which is sought to be proved. A certificate or statement signed by a public officer, or by his deputy or assistant, to the effect that the publication was obtained from his office will be prima facie sufficient to establish that fact. Such a certificate or statement can be authenticated in the same manner as an attesting certificate and as though the publication of foreign law was an official record kept in the public office from which the publication was obtained. See 143*b* (2). A failure to object, on the ground that it has not been properly authenticated, to a proffered publication containing evidence of foreign law may be considered a waiver of that objection.

A document containing evidence of foreign law which is in a language other than English may be translated in the same manner as a copy of a foreign official record may be. See 143*b* (2) (*f*). In any case in which a foreign law is proved by a document which is to be returned to the custodian thereof at the conclusion of the trial, pertinent extracts therefrom, or a proved or admitted translation of such document or extracts, may be included in the record of trial as an exhibit in lieu of the original.

148. COMPETENCY OF WITNESSES.—*a. General.*—The general competency, mental and moral, of a witness of fourteen or more years of age is always presumed. If the party alleging the contrary does not prove to the court a specific ground of incapacity, the witness should be allowed to testify.

Any known objection to the competency of a witness should be made before he is sworn. If his incompetency should later appear, however, a valid objection should be sustained or the court of its own motion should refuse to hear him further and order that any testimony that he may have given be disregarded.

b. ***Children.***—The competency of children as witnesses is not dependent upon their age, but upon their apparent sense and their understanding of the difference between truth and falsehood and of the moral importance of telling the truth. Such sense and understanding may appear upon such preliminary questioning of the child as the court deems necessary, or from the appearance of the child and the testimony that he gives in the case. In this connection, the court should bear in mind that the competency as a witness of a person below the age of fourteen cannot be presumed.

c. ***Mental infirmity.***—Although a witness may be suffering from mental infirmity, he is nevertheless competent to testify if he understands the moral importance of telling the truth and has the mental capacity to observe, recollect, and describe correctly the facts under investigation.

d. ***Conviction of crime.***—Conviction of an offense does not disqualify a witness but certain convictions may be shown to diminish his credibility. See 153*b* (2) (*b*).

e. ***Interest or bias.***—Interest or bias does not disqualify a witness. For instance, the fact that a person owes a party money or has property interests with or against the party does not disqualify him from testifying for or against such party. A person who is an avowed friend or enemy of the accused, or who is an enemy national, is not thereby disqualified from testifying for or against the accused.

Husband and wife are competent witnesses in favor of each other. Although husband and wife are also competent witnesses against each other, the general rule is that both are entitled to a privilege prohibiting the use of one of them as a witness (sworn or unsworn) against the other. This privilege does not exist, however, when the husband or wife is the individual or one of the individuals injured by the offense with which the other spouse is charged, as in a prosecution for an assault upon one spouse by the other, for bigamy, polygamy, unlawful cohabitation, abandonment of wife or children or failure to support them, for using or transporting the wife for "white slave" or other immoral purposes, or for forgery by one spouse of the signature of the other to a writing when the writing would, if genuine, apparently operate to the prejudice of such other. When the privilege does exist, it may be waived by the consent, express or implied, of both spouses to the use of one of them as a witness against the other. If one spouse testifies in favor of the other, the privilege may not be asserted upon cross-examination of the spouse who has so testified, provided such cross-examination is limited to the issues concerning which such spouse has testified on direct examination and to the question of his or her credibility. See 151*b* (2) as to the privilege relating to communications between husband and wife.

The accused is at his own request, but not otherwise, a competent witness. His failure to make such a request shall not create any presumption or inference against him. If he takes the stand as a witness, he is, in general, subject to the same rules of evidence that apply with respect to other witnesses. As to cross-examination of the accused, see 149*b* (1).

One of two or more accomplices or conspirators is competent to testify whether he is charged jointly or separately or not at all, and whether he is tried jointly or in common or separately, and whether he is called for the prosecution or for the defense, except that he may assert his privilege not to incriminate himself when that privilege is applicable and has not been waived, and, if he is an accused at the same trial, he cannot be called as a witness except upon his own request. See in this connection 150*b* (Compulsory self-incrimination). See also 149*b* (1) as to the extent to which the privilege of self-incrimination is waived by an accused when he testifies.

The fact that an accomplice testifies for the prosecution does not make him afterwards immune to trial except to the extent that immunity may have been promised him by an authority competent to order his trial by general court-martial. The fact that a witness has obtained a promise of immunity without which he may not have been willing to testify does not disqualify him as a witness.

149. EXAMINATION OF WITNESSES.—*a. General.*—As to oaths of witnesses, see 114. When a witness is recalled to the witness stand, he will not be sworn again, but should be reminded that he has been sworn in the case and is still under oath. A failure so to remind him, however, does not affect the validity of the trial and will not be a ground for rejecting his testimony.

Subject to the discretion of the court, a witness before completing his testimony is not ordinarily permitted to be present in court during the introduction of other evidence or during the opening statements. The fact that a witness was so present may be commented upon in argument by either party, in relation to the weight to be given to the testimony of the witness.

Witnesses are usually examined in the following order: Witnesses for the prosecution, witnesses for the defense, witnesses for the prosecution in rebuttal, witnesses for the defense in rebuttal, witnesses for the court. The order of examining each witness is usually direct examination, cross-examination, redirect examination, recross-examination, and examination by the court. However, the court may permit the recall of witnesses, including an accused, at any stage of the proceedings; it may permit material testimony to be introduced by either party out of its regular order and place; and may permit a case once closed by either or both sides to be reopened for the introduction of testimony previously omitted.

The court should not excuse a witness until satisfied that neither party has any further questions to ask him.

Refusal by a witness to answer a proper question is a military offense or an offense under Article 47, according to whether the witness is subject to the code.

It is never necessary for a party to ask questions through the court or to ask that the court adopt a question.

A witness should be required to limit his answers to the question asked. He cannot, however, be required to answer categorically by a simple "yes" or "no" unless it is clear that such an answer will be a complete response to the question. A witness may always be permitted at some time before completing his testimony to explain any of his testimony.

The reason for any objection will ordinarily be stated.

With reference to questioning witnesses through an interpreter see 50*b*.

b. ***Cross-examination; redirect and recross-examination; examination by the court or a member.***—(1) *Cross-examination.*—Cross-examination of a witness is a matter of right. It should, in general, be limited to the issues concerning which the witness has testified on direct examination and to the question of his credibility. Counsel often cannot know in advance what pertinent facts may be brought out on cross-examination and for that reason it is to some extent exploratory. Reasonable latitude should be given the cross-examiner, even though he is unable to state to the court what facts his cross-examination is intended to develop. Leading questions may be used freely on cross-examination.

The extent of cross-examination with respect to a legitimate subject of inquiry is within the sound discretion of the court. No obligation is imposed upon the court to protect a witness, whatever his rank, office, or station in life, from being discredited upon cross-examination, so long as the interrogation falls short of an attempted invasion of his right not to incriminate himself, properly invoked. The witness should, however, be protected from questions which go beyond the bounds of proper cross-examination merely to harass, annoy, or humiliate him. On the question of his credibility and within the limits imposed by the privilege against self-incrimination a witness may be cross-examined as to any matter touching upon his worthiness of belief, including (unless the court in its discretion decides that the relationship of the particular matter to the credibility of the witness is too remote) his relation to the parties and to the subject matter of the case, his interest, motives, and inclinations, his way of life, affiliations, associations, acts of misconduct, habits, and prejudices, his means of obtaining a correct and certain knowledge of the facts about which he testifies and the manner in which he has used those means, his powers of discernment, memory and description, and his physical defects, infirmities, and mental idiosyncrasies. He may be asked in a proper case whether he has expressed animosity toward the accused, or whether, on a specified occasion, he made a statement materially different from that embraced in his testimony. See generally, 153*b* (Impeachment of witnesses).

An accused person who voluntarily testifies as a witness becomes subject to cross-examination upon the issues concerning which he has testified and upon the question of his credibility. So far as the latitude of the cross-examination is discretionary with the court, a greater latitude may be allowed in his cross-examination than in that of other witnesses. When the accused voluntarily testifies about an offense for which he is being tried, as when he voluntarily testifies in denial or explanation of such an offense, he thereby, with respect to cross-examination concerning that offense, waives the privilege against self-incrimination, and any matter relevant to the issue of his guilt or innocence of such offense is properly the subject of cross-examination. When an accused is on trial for a number of offenses and on direct examination has testified about only one or some of them, he may not be cross-examined with respect to the offense or offenses about which he has not testified. If the accused testifies on direct examination only as to matters not bearing upon the issue of his guilt or innocence of any offense for which he is being tried, he may not be cross-examined on the issue of his guilt or innocence. Thus, if an accused testifies on direct examination only as to the involuntary nature of his confession or admission, he may not be asked on cross-examination to state whether his confession or admission was true or false, for such a question would go to the issue of his guilt or innocence, concerning which he has not testified.

(2) *Redirect and recross-examination.*—Ordinarily, the redirect examination deals with matters brought out in the cross-examination, but new matters may be developed. The recross-examination should be confined to the issues brought out on the redirect examination.

(3) *Examination by the court or a member.*—The court (includ-

ing the law officer) and its members may ask a witness any questions that either side might properly ask the witness. If new matter, not properly the subject of cross-examination of the witness on his previous testimony, is elicited by questions of the court or its members, both parties will be permitted to cross-examine the witness upon the new matter.

In questioning an accused the court and its members must confine themselves to questions which would be permissible on cross-examination of the accused by the prosecution.

Questions by the court or its members and evidence elicited thereby are subject to objection on proper grounds by either side and by the law officer and members of the court.

c. ***Leading questions; ambiguous and misleading questions; other objectionable questions.***—(1) *Leading questions.*—(*a*) *General rule*—Leading questions are questions which either suggest the answer it is desired the witness shall make or which, embodying a material fact, are susceptible of being answered by a simple yes or no. A leading question, except on cross-examination, should be excluded upon proper objection. For example, if a knife is introduced into evidence a witness should not be asked on direct examination whether it is the knife with which he saw the accused stab A. He should be asked first whether he recognizes the knife, and if he answers that he does, then he may be asked where he saw it and what was done with it. A question may be leading even though it includes the prefatory phrase, "Did you or did you not—?"

(*b*) *Exceptions.*—To abridge the proceedings, the witness may be led at once to points upon which he is to testify. The general rule is therefore not applicable to that part of the examination of a witness which is purely introductory. For example, in a desertion case the policeman who supposedly apprehended the accused may be asked whether he saw the accused at a time and place mentioned in the question.

When a witness appears to be hostile to the party calling him, or is manifestly unwilling to give evidence, the court may, in its discretion, permit the party calling him to use leading questions. In this connection, see 153*b* (Impeachment of witnesses).

When it appears that a witness has made an erroneous statement through a mere slip of the tongue, his attention may be directed to the matter by a leading question in order to afford him an opportunity to correct the statement if he so desires.

When, from the nature of the case, the mind of the witness cannot be directed to the subject of the inquiry without a particular specification of it, a leading question may be asked for that purpose. Thus, if a witness testifies that he heard the accused make a certain statement on a certain occasion in the hearing of certain other persons and such persons are called to contradict the witness, each of them may be asked whether he heard the accused make the statement on that occasion.

In other cases the court, in its discretion, may allow liberal departures from the rule, as when a witness is obviously embarrassed and timid through fear of strange surroundings or for other reasons, or when the witness, because of his age or mental infirmity, is laboring under obvious difficulties in directing his mind toward the subject matter of the inquiry. However, the court must always be careful, in departing from the rule, not to allow a witness an opportunity to shape his testimony as he thinks the questioner desires. The court must also be careful, in departing from the rule, not to allow a witness an opportunity to shape his testimony to conform to the testimony of other witnesses from suggestions he may gather during the examination.

A witness who does not recollect, or is not certain about, a particular matter concerning which he is called upon to testify may be permitted, on his direct or other examination, to refresh his present recollection (and then to testify therefrom) or to state that certain data represent his past recollection as to such matter. In order that he may properly refresh his present recollection or testify concerning his past recollection, data or events having a tendency to aid him in this respect may be brought to his attention and he may be questioned as to the effect of such data or events on his memory. See 146*a* (Memoranda).

(2) *Ambiguous and misleading questions.*—A question which is ambiguous or misleading should never be permitted either on direct or cross-examination. Such a question is unfair to the witness, who may thereby be led into making an unintentional misstatement. Moreover his answer may give a wrong impression to the court. Included in ambiguous or misleading questions are those embodying two or more separate elements or questions. Thus the question "Did you see the accused leave the quarters with a bundle under his arm?" really contains four questions. Under certain circumstances the affirmative or negative answer of the witness might be intended to apply to only one of the four questions involved and might be understood by the court to apply to all of them. Also included are questions which assume a fact to which the witness has not previously testified. Thus the question "When you saw the accused was anyone with him?" would be improper unless the witness has previously testified that he had seen the accused.

(3) *Other objectionable questions.*—Questions should not be asked for the purpose of suggesting matters known not to exist or that the rules of evidence clearly make inadmissible. See also 150 (Degrading and incriminating questions).

150. DEGRADING AND INCRIMINATING QUESTIONS.—*a.* ***Compulsory self-degradation.***—Under Article 31*c* no person may be compelled to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him. The privilege against compulsory self-degradation applies only to matters not material to the issue, whereas the privilege against compulsory self-incrimination covers all matters whatsoever. Whenever a witness refuses to answer a question on the ground that the answer thereto would not be material to the issue and might tend to degrade him, the court shall determine whether the question does or does not call for an answer material to the issue, and, if the court rules that it does or that the answer could not tend to degrade the witness, the witness may be required to answer the question. A question calls for an answer material to the issue when the answer might be expected to have some bearing upon any subject of inquiry legitimately before the court, including the credibility of witnesses.

b. ***Compulsory self-incrimination.***—The fifth amendment to the Constitution of the United States provides that in a criminal case no person shall be compelled "to be a witness against himself." The principle embodied in this provision applies to trials by courts-martial. It is not limited to the person on trial but extends to any person who may be called as a witness. Also, Article 31*a* provides that no person subject to the code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

If the witness states that the answer to a question might tend to incriminate him, he will not be required to answer the question unless it clearly appears to the court that no answer he might make to the question could have that effect or unless the witness has waived the privilege against self-incrimination.

Although an answer to a question apparently would incriminate or tend to incriminate a witness, he may be required to answer if, because of grant of immunity, former trial, the running of the statute of limitations, or some other reason, he can successfully object to being tried for the offense as to which the privilege is asserted.

The privilege of a witness to refuse to respond to a question the answer to which may tend to incriminate him is a personal one which the witness may exercise or waive as he may see fit. Such a question is not subject to objection by counsel or by the court, although the court should advise an apparently uninformed witness of his right to decline to make any answer which might tend to incriminate him. A witness who answers a question without having asserted the privilege and thereby admits a self-incriminating fact may be required to make a full disclosure, however self-incriminating, of the matter to which that fact relates, for to this extent he has waived the privilege by making the answer. See also with respect to waiving this privilege, 149*b* (1) (Cross-examination of an accused).

The prohibition against compelling a person to give evidence against himself relates only to the use of compulsion in obtaining from him a verbal or other communication in which he expresses his knowledge of a matter and does not forbid compelling him to exhibit his body or other physical characteristics as evidence when such evidence is material. Consequently, it is not a violation of the prohibition to order a person (including an accused) to expose his body for examination by the court or by a physician who will later testify as to the result of his examination. Upon refusal to obey the order, the person's clothing may be removed by force. Also, the prohibition is not violated by requiring a person (including an accused) to try on clothing or shoes, to place his feet in tracks, to make a sample of his handwriting, to utter words for the purpose of voice identification, or to submit to having fingerprints or a sample of his blood taken.

151. PRIVILEGED AND NONPRIVILEGED COMMUNICATIONS.—*a. **General.***—A privileged communication is a communication made as an incident of a confidential relation which it is the public policy to protect. Since public policy is involved, the court, of its own motion, should refuse to receive evidence of such a communication unless it appears that the privilege has been waived by the person or government entitled to the benefit of it, or unless the evidence emanates from a person or source not bound by the privilege.

b. ***Certain privileged communications.***—(1) *State secrets and police secrets.*—Communications made by informants to public officers engaged in the discovery of crime are privileged. The deliberations of courts and of grand or petit juries are privileged, but the results of their deliberations are not privileged. Diplomatic correspondence is privileged and, in general, so are all oral and written official communications the disclosure of which would, in the opinion of the head of the executive or military department or independent governmental agency concerned, be detrimental to the public interest.

The privilege that extends to communications made by informants to public officers engaged in the discovery of crime may be waived by appropriate governmental authorities. This privilege does not warrant the exclusion from evidence of statements of informants which are inconsistent with, or might otherwise be used to impeach, their testimony as witnesses. See 153*b* (Impeachment of witnesses).

(2) *Communications between husband and wife, client and attorney, and penitent and clergyman.*—Among the communications to which a privilege attaches are certain communications between husband and wife, client and attorney, and penitent and clergyman. Confidential communications between husband and wife, made while they were husband and wife and not living in separation under a judicial decree, are privileged. See also 148*e* (Interest or bias). Communications between a client and his attorney (or the agent of the attorney) are privileged when made while the relation of client and attorney existed and in connection with the matter for which the attorney was engaged, unless such communications clearly contemplate the commission of a crime—for instance, perjury or subornation of perjury. Military or civilian counsel detailed, assigned, or otherwise engaged to defend or represent an accused before a court-martial or upon review of its proceedings, or during the course of an investigation of a charge, are attorneys, and the accused is a client, with respect to the client and attorney privilege. Also privileged are communications between a person subject to military law and a chaplain, priest, or clergyman of any denomination made in the relationship of penitent and chaplain, priest, or clergyman, either as a formal act of religion or concerning a matter of conscience. The person entitled to the benefit of the privilege pertaining to confidential communications between husband and wife is the spouse who made the communication; the person entitled to the benefit of the client and attorney privilege is the client; and the person entitled to the benefit of the penitent and clergyman privilege is the penitent.

The general rule is that the court should neither require nor permit any such privileged communication to be disclosed unless the person who is entitled to the benefit of the privilege consents to the disclosure of the communication or otherwise waives the privilege. To this general rule there are several exceptions, among them being the following:

> The privilege pertaining to confidential communications between husband and wife will not prevent the court from allowing or requiring such a communication to be disclosed at the request of a spouse who is an accused, even though he or she is the person to

whom the communication was made and the spouse who made it objects to its disclosure.

The purpose of the privilege extended to communications between husband and wife, client and attorney, and penitent and clergyman, which grows out of a recognition of the public advantage that accrues from encouraging free communication in such circumstances, is not disregarded by allowing or requiring an outside party who overhears or sees such a privileged communication, whether by accident or design, to testify concerning it, nor is the purpose of the privilege disregarded by the reception in evidence of a writing containing such a communication which was obtained by an outside party either by accident or design. But see 152. However, this exception to the general rule does not apply if the outside party who overheard or saw the privileged communication, or who obtained the writing containing it, did so, in the case of a communication between husband and wife, with the connivance of the spouse to whom the communication was made, or, in the case of a communication between client and attorney, with the connivance of the attorney, or, in the case of a communication between penitent and clergyman, with the connivance of the clergyman. With respect to disclosing or conniving to disclose communications which are subject to the client and attorney privilege, the attorney's agent, such as his interpreter, clerk, stenographer, or other associate, is not an outside party and occupies the same position as does his principal. Also, with respect to disclosing or conniving to disclose communications which are subject to the penitent and clergyman privilege, the clergyman's agent, such as his interpreter or assistant, is not an outside party and occupies the same position as does his principal.

(3) *Confidential and secret evidence.*—The Inspectors General of the various armed forces, and their assistants, are confidential agents of the Secretaries of the military or executive departments concerned, or of the military commander on whose staff they may be serving. Their investigations are privileged unless a different procedure is prescribed by the authority ordering the investigation. Reports of such investigations and their accompanying testimony and exhibits are likewise privileged, and there is no authority of law or practice requiring that copies thereof be furnished to any person other than the authority ordering the investigation or superior authority. However, when application is made to the authority ordering the investigation for permission to use in a trial by court-martial certain testimony, or an exhibit, accompanying a report of investigation,

which testimony or exhibit has become material in the trial (to show an inconsistent statement of a witness, for example), he should ordinarily approve such application unless the testimony or exhibit requested contains a state secret or unless in the exercise of a sound discretion he is of the opinion that it would be contrary to public policy to divulge the information desired.

In certain cases, it may become necessary to introduce evidence of a highly confidential or secret nature, as when an accused is on trial for having unlawfully communicated information of such a nature to persons not entitled thereto. In a case of this type, the court should take adequate precautions to insure that no greater dissemination of such evidence occurs than the necessities of the trial require. The courtroom should be cleared of spectators while such evidence is being received or commented upon, and all persons whose duties require them to remain should be warned that they are not to communicate such confidential or secret information. But see 33*f* as to cases which, because of the security risks involved, should not be brought to trial.

c. ***Certain nonprivileged communications.***—(1) *Communications by wire or radio.*—Communications are not privileged because transmitted by wire or radio, and the information concerning them that comes to the knowledge of operators, either military or civilian, of any such means of transmission is likewise not privileged by reason of the means of transmission used. Wire or radio operators, military and civilian, may be ordered or subpoenaed to testify before a court-martial as to wire or radio communications, and telegrams and radiograms may be brought before a court-martial by the usual process. But see 151*b* and 152.

(2) *Communications to medical officers and civilian physicians.*—It is the duty of medical officers to attend sick members of the armed forces, to make periodical physical examinations as required by regulations and to examine persons for enlistment, and medical officers may be specially directed to observe, examine, or attend a member of the armed forces. Such observation, examination, or attendance would be official and the information thereby acquired would be official. Although the ethics of the medical profession forbid medical officers and civilian physicians to disclose without authority information acquired when acting in a professional capacity, no privilege attaches to such information or to statements made to them by patients.

152. CERTAIN ILLEGALLY OBTAINED EVIDENCE.—Evidence is inadmissible against the accused if it was obtained as a result of an unlawful search of his property conducted or instigated by persons acting under authority of the United States, or if it was obtained under such circumstances that the provisions of Section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U. S. C. 605), pertaining to the unauthorized divulgence of communications by wire or radio, would prohibit its use against the accused were he being tried in a United States district court. All evidence obtained through information supplied by such illegally obtained evidence is likewise inadmissible. For example, evidence obtained by a lawful search is inadmissible if that search was conducted because of information derived from a preceding unlawful search of the kind mentioned above. Military courts have no authority to order a return to the accused of illegally seized property, or to impound such property for the purpose of suppressing its possible use as evidence, or to entertain a motion for the return or impounding of property alleged to have been illegally seized. Consequently, an objection to the use of evidence on the ground that it was illegally obtained, or on the ground that it was obtained through information supplied by illegally obtained evidence, is properly made at the time the prosecution attempts to introduce the evidence. Before the court rules upon such an objection, the accused should be given an opportunity to show the circumstances under which the evidence was obtained.

The following searches are among those which are lawful:

A search conducted in accordance with the authority granted by a lawful search warrant.

A search of an individual's person, of the clothing he is wearing, and of the property in his immediate possession or control, conducted as an incident of lawfully apprehending him.

A search under circumstances demanding immediate action to prevent the removal or disposal of property believed on reasonable grounds to be criminal goods.

A search made with the freely given consent of the owner in possession of the property searched.

A search of property which is owned or controlled by the United States and is under the control of an armed force, or of property which is located within a military installation or in a foreign country or in occupied territory and is owned, used, or occupied by persons subject to military law or to the law of war, which search has been authorized by a commanding officer (including an officer in charge) having jurisdiction over the place where the property is situated or, if the property is in a foreign country or in occupied territory, over personnel subject to military law or to the law of war in the place where the property is situated. The commanding officer may delegate the general authority to order searches to persons of his command. This example of authorized searches is not intended to preclude the legality of searches made by military personnel in the areas outlined above when made in accordance with military custom.

153. CREDIBILITY OF WITNESSES; IMPEACHMENT OF WITNESSES.—*a. Credibility of witnesses.*—The credibility of a witness is his worthiness of belief, and may be determined by the acuteness of his powers of observation, the accuracy and retentiveness of his memory, his general manner in giving evidence, his relation to the matter in issue, his appearance and deportment, his friendships and prejudices, and his character as to truth and veracity, by comparison of his testimony with other statements made by him and with the testimony of others, and by other evidence bearing upon his veracity. See in this connection 149*b* (1) (Cross-examination).

The court may ordinarily draw its own conclusions as to the credibility of a witness and attach such weight to his evidence as his credibility may warrant. However, there are cases in which the court would be justified in attaching no weight at all to the testimony of a witness, or in which the court would not be warranted in accepting certain testimony as sufficient to establish the guilt of an accused. For example, a conviction cannot be sustained solely on the self-contradictory testimony of a particular witness, even though motive to commit the offense is shown, if the contradiction is not adequately explained by the witness in his testimony. Also a conviction cannot be based upon the uncorroborated testimony of an alleged victim in a trial for a sexual offense, or upon the uncorroborated testimony of a purported accomplice in any case, if such testimony is self-contradictory, uncertain, or improbable. The uncorroborated testimony of an accomplice, even though apparently credible, is of doubtful integrity and is to be considered with great caution.

In general, a person gains no corroboration merely because he repeats a statement a number of times. Hence, a witness ordinarily may not be corroborated by showing that he made statements consistent with his testimony. But this is only a general rule, and there are some situations in which such statements, having a real evidential value, are admissible. If the testimony of a witness has been attacked on the ground that it was due to an influence created by a matter which came into existence after the happening of the event to which such testimony relates, evidence of his statements or conduct, consistent with his testimony, made or occurring before the creation of that influence should ordinarily be received. For example, if a witness is impeached on the ground of bias due to a quarrel with the accused, the fact that before the date of the quarrel he made an assertion similar to his present testimony tends to show that his present testimony is not due to bias. If his impeachment is sought on the ground of collusion or corruption, consistent statements made prior to the imputed or admitted collusion or corruption may have such evidential value as to make them admissible, and if his testimony is attacked on the ground that he made an inconsistent statement or on the ground that such testimony was a fabrication of recent date, evidence that he had made a consistent statement before there was a motive to misrepresent, and before any imputed or admitted inconsistent statement, may be received.

If a witness testifies as to the identity of the accused as the person who committed, or did not commit, the offense in question, such testimony may be corroborated, even though the credibility of the witness has not been directly attacked, by showing that the witness made a similar identification with respect to the accused on a previous occasion. In such a case the identifying witness himself and any person who has observed the previous identification may testify concerning it. See as to corroboration of the victim in sexual offenses, 142*c* (Fresh complaint). See also 139*b* (Illustrations of hearsay rule).

b. ***Impeachment of witnesses.***—(1) *General.*—See 149*b* (1) (Cross-examination). Impeachment signifies the process of attempting to diminish credibility. The credibility of any witness, including an accused who has become a witness, may be attacked.

The general rule is that a party is not permitted to impeach his own witness; that is, deliberately to attempt to discredit him. Inconsistencies which incidentally develop between witnesses for the same side are not such prohibited impeachments. The general rule is subject to a few exceptions. If a party is compelled to call a witness whom the law or the circumstances of the case make indispensable, or if a witness proves unexpectedly hostile to the party calling him, the party is permitted to impeach the witness. In the latter case it must first appear that the party calling the witness has been surprised by hostile evidence given by the witness. If surprise is the only reason for permitting a party to impeach his own witness, the party may directly attack the credibility of the witness only by proof of inconsistent statements and may not, for instance, show that the witness has a bad character as to truth and veracity or that the witness has been convicted of crime. The surprise which will allow a party to impeach his own witness must be actual, not feigned, surprise. The party must have had an honest belief that the witness would testify as expected. The fact that he was advised by a person other than the witness that the witness would testify in a certain manner is no basis for a claim of surprise when the witness fails to do so. However, in this respect, the party may rely upon statements purportedly made by the witness in the course of an official investigation as set forth in a summary of the expected testimony of the witness or in other documents.

Witnesses for the court are not witnesses for the prosecution or defense and may be impeached by either side.

(2) *Various grounds.*—(*a*) *General lack of veracity.*—For the purpose of impeachment it may be shown that a witness has a bad character as to truth and veracity. After impeaching evidence of this kind is received, or after it is shown that the witness has been convicted of a crime affecting his credibility or, in a proper case, that the witness has an unchaste character (see below, Conviction of crime), proof that the witness has a good character as to truth and veracity may be introduced in rebuttal. A witness who gives competent testimony concerning the character (or reputation) of the person in question as to truth and veracity may be asked whether he would believe the person on oath. See 138*f* (1) as to ways of proving character.

(*b*) *Conviction of crime.*—A witness may be impeached by showing that he has been convicted by a civil or military court of a crime which involves moral turpitude or is such as otherwise to affect his credibility. Proof of such conviction may be made by the original or an admissible copy of the record thereof, or by an admissible copy of the order promulgating the result of trial. Before introducing such proof, the witness may first be questioned with reference to the conviction sought to be shown. If the witness admits the conviction, other proof is unnecessary. The limitations upon the introduction of evidence of previous convictions set forth in 75*b* (2) do not apply to impeachment proceedings.

It is generally not permissible to impeach a witness upon the ground that he has committed a crime affecting his credibility by adducing—by means other than cross-examination of the witness—evidence not amounting to proof of conviction of the crime. However, in a prosecution for rape, or for any other sexual offense in which lack of consent is an element, any evidence, otherwise competent, tending to show the unchaste character of the alleged victim is admissible on the issue of the probability of her having consented to the act charged (whether or not she has testified as a witness) and on the question of her credibility, without proof of conviction of any crime involved. For this purpose, evidence of her lewd repute, habits, ways of life, or associations, and of her specific acts of illicit sexual intercourse or other lascivious acts with the accused or others, is material. Evidence of this kind is generally admissible whether the circumstances to which it refers existed before or after the commission of the alleged offense, but the court may refuse to receive such evidence if in the exercise of a sound discretion it determines that the evidence would be so remote with respect to the matter intended to be shown thereby as to be irrelevant. Thus upon cross-examination of the victim in a rape case, it would be proper for the court to exclude a question calling for her testimony as to whether, within an unspecified period of time before the alleged rape, she had participated in illicit sexual intercourse. On the other hand, it would be improper to prohibit an attempt, upon her cross-examination or otherwise, to show that she was engaged in the business of prostitution at or about the time of the alleged rape. For the purpose of impeaching the credibility of the alleged victim, evidence that the victim has an unchaste character is admissible, under the above conditions, in a prosecution for any sexual offense, such as carnal knowledge, even though consent is not an element of the offense. Evidence that the alleged victim of a sexual offense has a good character as to chastity is admissible for the purpose of showing the probability of lack of consent, when lack of consent is material, or to rebut the implications arising from contrary evidence.

For the purpose of impeachment it may be shown by cross-examination or otherwise that the witness is in custody and that his testimony was affected by fear or favor growing out of his detention.

(*c*) *Inconsistent statements.*—A witness may be impeached by showing by any competent evidence that he made a statement (or engaged in other conduct) inconsistent with his testimony, but a foundation must first be laid before introducing evidence of an inconsistent statement. The foundation for the introduction of evidence of the making of an inconsistent oral statement is laid by asking the witness if he made the inconsistent statement, at the same time directing his attention to the time and place of the statement and the person or persons to whom it was made. This procedure may also be used in the case of an inconsistent written statement, and, if it is used, the writing need not be shown to the witness. If the witness admits making the inconsistent statement, no other proof that he made it is admissible. If he denies making the statement, or testifies that he does not remember whether he made it or not, or refuses to testify as to whether he made it, evidence that he did make the statement may be introduced. When the inconsistent statement is contained in a writing apparently signed or written by the witness, a sufficient foundation may be laid by showing the writing to the witness and asking him whether the signature is his or whether he was the author of the written statement. If he admits that the signature is his or that he was the author, the writing then becomes admissible in evidence. If he does not make any such admission but either of these facts is otherwise proved, the writing will then become admissible in evidence.

An oral inconsistent statement of a witness may be proved by the testimony of anyone who heard him make it, even though the statement was reduced to writing and the writing is unaccounted for. See 141 as to proving an inconsistent statement made through an interpreter.

It is to be borne in mind that proof that a witness made an inconsistent statement is generally admissible only for the purpose of impeaching him. Proof of an inconsistent statement of a witness is not admissible to establish the truth of the matters asserted in the statement unless such proof may properly be received as evidence of a voluntary confession or admission of the witness (in case he is the accused) or of some statement of the witness which is otherwise admissible as an exception to the hearsay rule, or unless the witness testifies that his inconsistent statement is true, not merely that he made it, and thus adopts the statement as part of his testimony. When proof of an inconsistent statement of a witness is admitted in evidence merely for the purpose of impeachment, the law officer (or the president of a special court-martial) should instruct the court in open session that such proof is to be considered for that purpose only and not for the purpose of establishing the truth of the matters asserted in the statement.

The fact that the inconsistent statement was made in the course of an investigation or at another trial does not cause proof of the making of the statement to be inadmissible for the purpose of impeachment. However, an accused who has testified as a witness may not be cross-examined upon, or impeached by proof of, any statement which was obtained from him in violation of Article 31 or through the use of coercion, unlawful influence, or unlawful inducement. But see the last paragraph of 140*a*.

A witness has a right to explain any apparently inconsistent statement made by him and may, if excused from the stand, be recalled for that purpose.

When a witness refuses to testify as to a certain fact (as when he relies on his right not to incriminate himself), or when a witness who gives no material testmony properly subject to impeachment testifies that he has no recollection as to such fact, it cannot be shown that at some other time he made a statement as to the fact in question. The reason for this rule is that proof of such a statement either would not impeach the testimony of the witness at all or would improperly impeach his testimony. However, when he does not refuse to testify but simply claims a failure of memory, the statement may be used in an attempt to refresh his present recollection or to establish his past recollection. See 146*a* (Memoranda) and 149*c* (1) (*b*) (Exceptions).

(*d*) *Prejudice and bias.*—Prejudice, bias, friendship, former quarrels, relationship, and other matters showing a motive to misrepresent may be shown to diminish the credibility of the witness, either by the testimony of other witnesses or by cross-examination of the witness himself.

(3) *Effect of impeaching evidence.*—Whether the credibility of the witness has been successfully impeached is ordinarily a question to be decided by each member of the court during his deliberation as to his vote upon the matter (if properly determined by vote) with respect to which the testimony of the witness was offered. Consequently, the law officer of a general court-martial, or the president of a special court-martial (or the majority of the members thereof), should not sustain a motion to strike from the record, or to disregard otherwise, the admissible testimony of a particular witness simply because impeaching evidence with respect to such witness or his testimony has been introduced.

154. MISCELLANEOUS MATTERS — INTENT; STIPULATIONS; OFFER OF PROOF; WAIVER OF OBJECTIONS.—

a. **Intent.**—(1) *General.*—In certain offenses, such as burglary, larceny, and certain kinds of desertion, a specific intent is necessary. In the kind of murder denounced by Article 118 (1) a premeditated design to kill must be proved. A specific intent, or a premeditated design to kill, may be established either by direct evidence, as, for example, words proved to have been used by the offender, or by circumstantial evidence, as by inference from the act itself.

Other illustrations and details as to evidence of specific intent, or of general criminal intent, in the more usual cases are included in chapter XXVIII (Punitive Articles).

(2) *Drunkenness.*—A temporary loss of reason which accompanies and is part of a drunken spree and which is not the result of delirium tremens or some other mental defect, disease, or derangement is not insanity in the legal sense. It is a general rule of law that

voluntary drunkenness not amounting to legal insanity, whether caused by liquor or drugs, is not an excuse for crime committed while in that condition; but such drunkenness may be considered as affecting mental capacity to entertain a specific intent, or to premeditate a design to kill, when either matter is a necessary element of the offense.

Evidence of drunkenness should be carefully scrutinized, as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act.

In court-martial practice, evidence of drunkenness of the accused may be admitted on the question of the measure of punishment to be awarded in the event of conviction, even though, in the particular case, the intent of the accused is not an issue.

As to proof of drunkenness, see 138*e* (Opinion evidence) and 191 (Drunk on duty).

(3) *Ignorance of fact.*—Unless otherwise provided (expressly or by implication) by the law denouncing the offense in question, ignorance or mistake of fact will exempt a person from criminal responsibility if it is an honest ignorance or mistake and not the result of carelessness or fault on his part. Examples appear in chapter XXVIII (Punitive Articles).

(4) *Ignorance of law.*—As a general rule, ignorance of law, or of regulations or directives of a general nature having the force of law, is not an excuse for a criminal act. However, if a special state of mind on the part of the accused, such as a specific intent, constitutes an essential element of the offense charged, an honest and reasonable mistake of law, including an honest and reasonable mistake as to the legal effect of known facts, may be shown for the purpose of indicating the absence of such a state of mind. Also, before a person can properly be held responsible for a violation of any regulation or directive of any command inferior to the Department of the Army, Navy, or Air Force, or the Headquarters of the Marine Corps or Coast Guard, or inferior to the headquarters of a Territorial, theater, or similar area command (with respect to personnel stationed or having duties within such area), it must appear that he knew of the regulation or directive, either actually or constructively. Constructive knowledge may be found to have existed when the regulation or directive was of so notorious a nature, or was so conspicuously posted or distributed, that the particular accused ought to have known of its existence.

The general rule that ignorance of law is not an excuse may be partially relaxed by courts-martial in trials for purely military offenses of persons recently enlisted. For example, a recently enlisted member of an armed force might be permitted to show that certain articles of the code had never been read to him as required by Article 137 of the code. Although such evidence would not amount to a defense, it could be regarded by the court as an extenuating circumstance.

b. ***Stipulations.***—(1) *As to facts.*—The parties may make a written or oral stipulation as to the existence or nonexistence of any fact. A stipulation need not be accepted by the court and should not be accepted if any doubt exists as to the accused's understanding of what is involved. If an accused has pleaded not guilty and the plea still stands, the court should not accept a stipulation which practically amounts to a confession. A stipulation of a fact which if true would operate as a complete defense to an offense charged should not be accepted by the court. In a capital or other important case a stipulation should be closely scrutinized before acceptance. The court is not bound by a stipulation even if received. For instance, other evidence before the court may convince the court that the stipulated fact is not true. The court may permit a stipulation to be withdrawn. If so withdrawn, it is not effective for any purpose.

(2) *As to testimony and documentary evidence.*—The parties may stipulate that if a certain person were present in court as a witness he would give certain testimony under oath. See in this connection 58*f* (Stipulations which warrant denial of a continuance). Such a stipulation does not admit the truth of the indicated testimony, nor does it add anything to the weight or the evidentary nature of the testimony. Stipulated testimony may be attacked or contradicted or explained in the same way as though the witness had actually so testified in person. The principles as to acceptance and withdrawal of stipulations as to facts apply here, but the court may be more liberal in accepting stipulations as to testimony.

Subject to the above observations as to stipulations of testimony, stipulations may be made as to the contents of a document.

c. ***Offer of proof.***—Whenever the court refuses to hear certain testimony offered in behalf of the accused, or to receive certain evidence of any kind offered in his behalf, the defense counsel may make a concise statement setting forth the substance of the expected testimony or other excluded evidence. The statement and any documentary evidence referred to therein will be included in the record of trial for the purpose of aiding reviewing and appellate authorities in arriving at their determination as to whether the action of the court in excluding the evidence in question was proper. No such statement shall be considered by the court as proof of the matters therein contained. See also 57*g*.

d. ***Waiver of objections.***—The prosecution or the defense may in open court either orally or in writing waive an objection to the admissibility of offered evidence. Such a waiver adds nothing to the weight of the evidence nor to the credibility of its source. The court in its discretion may refuse to accept, and may permit the withdrawal of, any such waiver. There is no prescribed form for making a waiver. Thus, if it clearly appears that the defense or prosecution understood its right to object, any clear indication on its part that it did not desire to assert that right may be regarded as a waiver of the objection. However, a waiver of an objection does not operate as a consent if consent is required, and a mere failure to object does not amount to a waiver except as otherwise stated or indicated in this manual.

Chapter XXVIII

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156. ARTICLE 77—PRINCIPALS

Discussion.—To constitute one an aider and abettor under this article, and hence liable as a principal, mere presence at the scene is not enough; there must be an intent to aid or encourage the persons who commit the crime. The aider and abettor must share the criminal intent or purpose of the perpetrator. If there is a concert of purpose to do a given criminal act, and such act is done by one of the parties, all probable results that could be expected from the act are chargeable to all parties concerned; but in order to make one liable as a principal in such a case, the offense committed must be one embraced by the common venture or an offense likely to result as a natural or probable consequence of the offense directly intended.

An accused, without intent to kill and without active participation in a homicide, is a principal guilty of a murder committed by those with whom he voluntarily associated himself in the execution of an unlawful design so desperate that it ordinarily involves a hazard to life. Moreover, an accused who plans a burglary which is actually carried out by his associates is a principal in the burglarly, and, if his associates shoot and kill the home owner in the course of the burglary, the planner is a principal in the murder as well.

While merely witnessing a crime without intervention does not make a person a party to its commission, if he had a duty to interfere and his noninterference was designed by him to operate and did operate as an encouragement to or protection of the perpetrator, he is a principal. Thus a sentinel or a guard charged with the duty of preventing the removal of government property who stands passively by while such property is taken in or from his presence by persons known to him to be thieves, is guilty of larceny of such property, for he is duty bound to prevent offenses against the property he is protecting, and his inaction in the presence of the perpetrators constitutes assent to, and concurrence in, the larceny.

One who counsels, commands, or procures another to commit an offense subsequently perpetrated in consequence of such counsel, command, or procuring is a principal whether he is present or absent at the commission of the offense. If such offense is effected, although by different means from those counseled, commanded, or procured, as for instance if A hires B to poison C and instead of poisoning him, B shoots C, A is nevertheless guilty of the homicide. Likewise, one who causes an act to be done which if directly performed by him would be punishable by the code is a principal. When the act is done, such principals are also chargeable with all results that could have been expected to flow as a probable consequence from the act counseled, commanded, procured, or caused to be done.

The person who executes the command of a principal may himself be innocent of any offense, as when a soldier at the command of a superior shoots a man who appears to the soldier to be one of the enemy, but who is known to the superior to be a friend.

For the proper manner of charging a person liable as a principal under this article, see appendix 6.

Proof.—See essential elements under the particular offense alleged.

157. ARTICLE 78—ACCESSORY AFTER THE FACT

Discussion.—Any person subject to the code who knows that an offense punishable by the code has been committed and who thereafter receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment is an accessory after the fact. Thus a person becomes an accessory after the fact to the escape of a prisoner if, knowing that a prisoner has escaped from confinement, he thereafter voluntarily provides such prisoner with transportation, clothing, money, or other necessaries to enable the prisoner to avoid his pursuers.

The assistance given a principal by an accessory after the fact is not limited to assistance designed to effect the personal escape or concealment of the principal, but includes those acts which are performed to conceal the commission of the offense by the principal. Thus a person is an accessory after the fact if, knowing that a crime has been committed, he assists and aids in concealing or suppressing evidence thereof. However, mere failure to report a known offense will not constitute one an accessory after the fact.

Proof.—(a) That an offense punishable by the code was committed; (*b*) that the accused received, comforted, or assisted the offender for the purpose of hindering or preventing his apprehension, trial, or punishment; and (*c*) that the accused knew, actually or constructively, that the person so received, comforted, or assisted was the offender.

It is not necessary to prove the conviction or arrest of a principal in order to prove that the offense, as to which the accused is allegedly an accessory after the fact, has been committed. Furthermore, evidence of conviction of the principal (such as a record thereof) cannot be used to establish against an alleged accessory the essential fact that the offense has been committed by the principal.

158. ARTICLE 79—LESSER INCLUDED OFFENSES

Discussion.—If the evidence adduced during a trial fails to prove an offense charged but does prove the commission of an offense necessarily included in that charged, the accused may be found guilty of such included offense. An accused may also be found guilty of an attempt to commit the offense charged or of an attempt to commit an offense necessarily included in that which was charged.

An offense found is necessarily included in an offense charged if all of the elements of the offense found are necessary elements of the offense charged. An offense is not included within an offense charged if it requires proof of any element not required in proving the offense charged or if it involves acts of which the accused was not apprised upon his arraignment. A familiar instance of an included offense is a finding of guilty of absence without leave under a charge of desertion. But one charged with desertion may not be found guilty of breaking arrest as an included offense thereunder because proof of arrest, a necessary element in proving breach of arrest, is not an element of the proof of desertion.

If the evidence fails to prove an offense charged but does prove the commission of an offense included in that charged, the court may by its findings except appropriate words and figures of the specification, and, if necessary, substitute others, finding the accused not guilty of the excepted matter but guilty of the substituted matter. For example, when a specification alleging burglary in violation of Article 129 is in the usual form and the proof at the trial shows that the act was not done in the nighttime, the accused may be found not guilty of burglary, but guilty of housebreaking. Such a finding may be worded as follows:

Of the Specification:	Guilty, except the words "in the nighttime, burglariously break and enter," substituting therefor the words "unlawfully enter," of the excepted words, not guilty, of the substituted words, guilty.
Of the Charge:	Not guilty, but guilty of a violation of Article 130.

When an included offense is found, the finding as to the charge should state a violation of the specific article violated and not a violation of Article 79. For a discussion of "Attempts," see 159.

159. ARTICLE 80—ATTEMPTS

Discussion.—An attempt to commit an offense is an act or acts done with the specific intent to commit the particular offense which, except for the interference of some cause preventing the carrying out of the intent, apparently would result in the actual commission of the offense.

To constitute an attempt there must be a specific intent to commit the particular offense accompanied by an overt act which directly tends to accomplish the unlawful purpose. The overt act must be more than mere preparation to commit the offense. Preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement towards the commission of the offense. However, the overt act need not be the last proximate act to the consummation of the offense attempted to be perpetrated. For example, a purchase of matches with the intent to burn a haystack is not an attempt to commit arson, but it is an attempt to commit arson to apply a burning match to a haystack, even though the match may be immediately put out by the rain, blown out by the wind, or otherwise extinguished.

It is not an attempt when every act intended by the accused could be completed without committing an offense, even though the accused may at the time believe he is committing an offense. But an accused may be guilty of an attempt, even though the crime turns out to be impossible of commission because of an outside intervening circumstance or because the accused miscalculated his opportunity to commit the offense intended. For example, if A without justification or excuse, levels a gun at B with intent to kill B, and pulls the trigger, A is guilty of attempt to murder, even though, unknown to A, the gun is defective and will not fire. A pickpocket who puts his hand in the pocket of another with intent to steal his purse is guilty of an attempt to steal, even though the pocket is empty.

Soliciting another to commit an offense does not constitute an attempt.

An accused may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated. See 158 (Lesser included offenses).

An attempt to commit an offense should be charged under this article unless such attempt is specifically denounced by some other article, when it shall then be charged under that article. See Articles 85, 94, 100, 104, 128.

Proof.—(*a*) That the accused did a certain act; (*b*) that the act was done with specific intent to commit a certain offense; and (*c*) that the act amounted to more than mere preparation and apparently tended to effect the commission of the intended offense.

160. ARTICLE 81—CONSPIRACY

Discussion.—To constitute the offense of conspiracy under the code, there must be a combination of two or more persons who have agreed to accomplish, by concerted action, an unlawful purpose or some purpose not in itself unlawful by unlawful means and, the doing of some act by one or more of the conspirators to effect the object of that agreement.

The agreement in a conspiracy need not be in any particular form nor manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play.

The overt act of a conspiracy must be an independent act by one or more of the conspirators following the agreement and done to carry into effect the object of that agreement. This overt act need not be in itself criminal, but it must be a manifestation that the conspiracy is being executed. Thus a telephone call by a conspirator to the intended victim of a conspiracy to rob, inviting the intended victim to the scene of the intended crime, would constitute the overt act necessary to complete the offense of conspiracy. An overt act by one conspirator becomes the act of all without any new agreement specifically directed to that act and each conspirator is equally guilty although he does not participate in, nor have knowledge of, all of the details of the execution of the conspiracy.

A person may be guilty of conspiracy although incapable himself of committing the intended offense. For example, a bedridden conspirator may knowingly furnish the automobile to be used in a robbery, or a guard may conspire with prisoners to effect their escape from confinement.

A conspiracy to commit an offense is a different and distinct offense from the offense which is the object of the conspiracy, and both the conspiracy and the consummated offense which was its object may be charged and tried. Nevertheless, the commission of the intended offense may also constitute the overt act which is an element of the conspiracy to commit that offense.

One or all of the parties to a conspiracy may, before the performance of an overt act to effect the object of the conspiracy, abandon the design and withdraw from the conspiracy, but there must be some affirmative act of withdrawal. However, after the formation of the conspiracy, the withdrawal of one or more conspirators neither creates a new conspiracy nor changes the status of the remaining members.

It is not a defense that the means adopted by the conspirators to achieve their object, if apparently adapted to that end, were actually not capable of success, nor that the conspirators were not physically able to accomplish their intended object.

Title 18 U. S. C. denounces conspiracies to commit certain specific offenses which do not require an overt act. Such conspiracies should be charged under Article 134.

Proof.—(*a*) That the accused and one or more persons named or described entered into an agreement; (*b*) that the object of the agreement was to commit an offense under the code; and (*c*) that one or more of the persons named or described performed an act to effect the object of the conspiracy, as alleged.

161. ARTICLE 82—SOLICITATION

Discussion.—A solicitation in violation of this article is complete when a solicitation is made or advice is given with the wrongful intent to influence another or others to commit any of the four offenses named in the article. It is not necessary that the person or persons solicited or advised act upon such solicitation or advice. If after the solicitation or advice the offense of desertion or mutiny is attempted or committed or the offense of misbehavior before the enemy or sedition is committed, the accused shall be punished with the punishment provided for the commission of the offense solicited or advised. If the offense of desertion or mutiny is not attempted or committed, or if the offense of misbehavior before the enemy or sedition is not committed, the accused shall be punished as a court-martial may direct.

Solicitation may be accomplished by other means than by word of mouth or by writing. Any act or conduct which reasonably may be construed as a serious request or advice to commit one of the offenses named in the article may constitute solicitation. It is not necessary that the accused act alone in the solicitation or in the advising; he may act through other persons in committing this offense.

Solicitation to commit offenses other than violations of the articles enumerated in this article may be charged as violations of Article 134.

Proof.—(*a*) That the accused solicited or advised a certain person or persons to commit the offense, as alleged.

If the offense solicited or advised was attempted or committed, there shall be added an additional element of proof: (*b*) That the offense solicited or advised was (committed) (attempted) as the proximate result of the solicitation or advice.

As to proof of the commission or attempted commission of the offense solicited or advised, see 157 (Proof).

162. ARTICLE 83—FRAUDULENT ENLISTMENT, APPOINTMENT, OR SEPARATION

Discussion.—A fraudulent enlistment, appointment, or separation is one procured by means of either a knowingly false representation in regard to any of the qualifications or disqualifications prescribed by law, regulation, or orders for the specific enlistment, appointment, or separation, or a deliberate concealment in regard to any such disqualification. The term enlistment includes induction or any other means of entry into service in an armed force.

The misrepresentation or concealment may be with regard to matters which, if truthfully stated or revealed, would induce an inquiry by the recruiting, appointing, or separating officer concerning the qualifications or disqualifications for enlistment, appointment, or separation, such as answers to questions as to previous service, previous applications for enlistment or appointment, or dependents.

An essential element of the offense of fraudulent enlistment or appointment is that the accused shall have received pay or allowances thereunder. Accordingly, a member of the armed forces who enlists or accepts an appointment without being regularly separated from a prior enlistment or appointment should be charged under this article only if he has received pay or allowances under the fraudulent enlistment or appointment. Acceptance of food, clothing, shelter, or transportation from the government, constitutes receipt of allowances. However, whatever is furnished the accused while in custody, confinement, arrest, or other restraint pending trial for fraudulent enlistment or appointment is not considered an allowance.

A person who procures himself to be enlisted, appointed, or separated by means of several misrepresentations and concealments as to his qualifications for the one enlistment, appointment, or separation so procured, commits but one offense under Article 83.

After apprehension, an accused who is charged with having fraudulently obtained his separation from an armed force shall be subject to this code while in the custody of the armed forces for trial upon the fraudulent separation. See Article 3*b*. As to offenses committed prior to a fraudulent separation, see 11.

Proof.—(*a*) The enlistment, appointment, or separation of the accused in or from an armed force; (*b*) that the accused knowingly misrepresented or deliberately concealed a certain material fact or facts regarding his qualifications for enlistment, appointment, or separation; (*c*) that his enlistment, appointment, or separation was procured by such knowingly false representation or deliberate concealment; and, in a case of fraudulent enlistment or appointment, (*d*) that under that enlistment or appointment the accused received either pay or allowances, or both, as alleged.

The receipt of pay or allowances should be proved by direct evidence if such evidence is reasonably available, but may be proved by circumstantial evidence, such as by showing that the accused was on duty under the enlistment or appointment a sufficient time to warrant the inference that he had been fed or sheltered, or both.

If concealment of a discharge of any type is alleged, the final indorsement on the service record is competent evidence of the fact, type, and date of discharge.

To prove that the accused enlisted or accepted appointments at various times under different names, his identity as the person so enlisted may be proved, prima facie, by photostatic copies of the various enlistment or appointment and identification records with the certificate of the chief custodian of the personnel records of the appropriate armed force, or one of his assistants, that the fingerprint records accompanying the various enlistment or appointment records have been compared by a duly qualified fingerprint expert on duty as such in his office and that the fingerprints are those of one and the same person. A similar certificate executed by the custodian, or by one of his assistants, of the fingerprint records of any department, bureau, or agency of the United States shall be equally admissible. See 143*a* (Proving contents of a writing—Exceptions).

If an accused is being held under suspected fraudulent enlistment or appointment at a place where he is unknown, his fingerprints should be taken and forwarded to the chief custodian of the personnel records of the armed force concerned for identification and comparison. If it appears from records of the appropriate armed force that the individual previously had been enlisted or appointed and was not regularly separated, the appropriate chief custodian of personnel records or one of his assistants will so certify, and the certificate, with the testimony of the person who took the fingerprints (or of someone present when they were taken), may be used to establish a prima facie case of fraudulent enlistment or appointment. Obviously, fingerprints are not the only method of identification. A witness may be available who has known the accused in his several enlistments or appointments and can identify him. So also signatures on the enlistment or appointment records, tattoo marks and scars on the body, peculiarities, and deformities may be used to establish identity.

If the period of the prior enlistment has elapsed, the fact that there was no discharge from his former enlistment may be proved, prima facie, by the certificate of the chief custodian of the personnel records of the armed force concerned, or one of his assistants, that the files and records of his office contain no record of the discharge of the accused from that enlistment.

163. ARTICLE 84—EFFECTING UNLAWFUL ENLISTMENT, APPOINTMENT, OR SEPARATION

Discussion.—The accused must know or have reasonable cause to believe that the enlistment, appointment, or separation effected by him was of an individual whose enlistment, appointment, or separation was prohibited by law, regulation, or order. The term enlistment includes induction or any other means of entry into the service of an armed force.

It must be proved that the enlistment, appointment, or separation when effected was prohibited by law, regulation, or order and that the accused knew that the individual whose enlistment, appointment, or separation he effected was ineligible for such enlistment, appointment, or separation.

Proof.—(*a*) That the accused effected the enlistment, appointment, or separation of the person named, as alleged; (*b*) that the person was ineligible for such enlistment, appointment, or separation because it was prohibited by law, regulation, or order; and (*c*) that the accused knew or was charged with knowledge of such facts at the time of the enlistment, appointment, or separation.

164. ARTICLE 85—DESERTION

a. DESERTION

Discussion.—Under Article 85*a* a member of the armed forces of the United States commits desertion when he:

> Without proper authority goes or remains absent from his place of service, organization, or place of duty with intent to remain away therefrom permanently; or
>
> Quits his unit or organization or place of duty with intent to avoid hazardous duty or to shirk important service; or
>
> Without being regularly separated from one of the armed forces, enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been so regularly separated, or enters any foreign armed service except when authorized by the United States.

Under Article 85*b*, any officer of the armed forces who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave, and with intent to remain away therefrom permanently, is guilty of desertion.

A prisoner whose dismissal or dishonorable or bad conduct discharge has been executed, although he may be subject to military law under Article 2 (7), is not a "member of the armed forces of the United States" within the meaning of Article 85.

(1) *Absence without proper authority with intent to remain away permanently.*—Both the absence without authority and the intent to remain away permanently are essential elements of the offense. The offense is complete when the person absents himself without authority from his place of service, his organization, or his place of duty with the intent to remain away therefrom permanently. It is not necessary that the person absent himself entirely from military jurisdiction and control, and the fact that such an intent is coupled with a purpose to report for duty elsewhere, or to enlist or accept an appointment in the same or another armed force, does not constitute a defense. A prompt repentance and return, while material in extenuation, is no defense; and a purpose to return, provided a particular but uncertain event happens in the future, may be considered an intent to remain away permanently. Unless, however, an intent to remain away permanently from his place of duty or service, or from his organization, exists at the inception of, or at some time during, the absence, the person cannot be a deserter guilty of desertion in violation of Article 85*a* (1), whether his purpose is to stay away a definite or an indefinite length of time. If a person while in desertion enlists or accepts an appointment in the same or another armed force and deserts while serving under that enlistment or appointment, he is amenable to trial for both desertions.

(2) *Quitting unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service.*—The "hazardous duty" or "important service" may include such service as duty in a combat or other dangerous area; embarkation for foreign duty or duty beyond the continental limits of the United States or for sea duty; movement to a port of embarkation for that purpose; entrainment for duty on the border or coast in time of war or threatened invasion or other disturbances; strike or riot duty; or employment in aid of the civil power in, for example, protecting property, or quelling or preventing disorder in times of great public disaster. Such services as drill, target practice, maneuvers, and practice marches will not ordinarily be regarded as included.

(3) *Enlisting or accepting an appointment in the same or another armed force, or entering a foreign armed service.*—The term enlistment includes induction or other means of entry into the service of an armed force. If, without being regularly separated from one of

the armed forces, a person enlists or accepts an appointment in the same or another armed force, his presence in the military service under such an enlistment or appointment is not in itself a return to military control with respect to his former enlistment or appointment, although a return may be effected through his voluntary disclosure of the facts or through the discovery of the facts without his aid. When such a deserter is confined by his commanding officer as a result of information received from the headquarters of the armed force concerned, his desertion should be regarded as terminated by apprehension.

A member of an armed force who, while in a status of being absent without proper authority, enlists or accepts an appointment in the same or another armed force, or enters a foreign armed service, may be guilty of committing desertion by being absent without authority with intent to remain away permanently, the intent being evidenced by his act of enlisting, accepting the appointment, or entering the foreign armed service. In such a case the desertion may be alleged as having occurred on the date the accused absented himself without authority.

Proof.—*Desertion by absence with intent to remain away permanently.*—(*a*) That without proper authority the accused absented himself from his place of service, organization, or place of duty; (*b*) that he intended, at the time of absenting himself or at some time during his absence, to remain away permanently from his place of service, organization, or place of duty; and (*c*) that his desertion was of a duration and was terminated, as alleged.

Desertion by quitting unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service.—(*a*) That the accused quit his unit, organization, or place of duty; (*b*) that he did so with intent to avoid hazardous duty or to shirk important service; and (*c*) that his desertion was of a duration, as alleged.

Desertion by enlisting or accepting appointment in the same or another armed force, or by entering a foreign armed service.—(*a*) That the accused was a member of an armed force and had not been regularly separated therefrom; (*b*) that while in such a status he enlisted or accepted an appointment in the same or another one of the armed forces without fully disclosing the fact that he had not been so regularly separated, or entered a foreign armed service not being authorized to do so by the United States; and (*c*) that his desertion was of a duration and was terminated, as alleged.

Desertion by quitting post or duties prior to notification of acceptance of resignation.—(*a*) That the accused was an officer of an armed force and had tendered his resignation; (*b*) that prior to due notice of the acceptance of his resignation, he quit his post or proper duties without leave; (*c*) that he did so with intent to remain away permanently from his post or proper duties; and (*d*) that his desertion was of a duration and was terminated, as alleged.

Absence without proper authority (*Absence without leave*).—Absence without leave is usually proved, prima facie, by entries in the morning report in the case of the Army and Air Force and by entries in the service record or unit personnel diary in the case of the Navy, Marine Corps, and Coast Guard. But these entries, even though they refer to an accused as a "deserter," are not complete evidence of desertion; they are evidence only of the absence without proper authority and attendant facts and circumstances required to be recorded (see 144*b*), and it is still necessary to prove the other elements of the offense of desertion. Having once been shown to exist, the condition of absence without proper authority with respect to an enlistment or appointment may be presumed to have continued, in the absence of proof to the contrary, until the return of the accused to military control under that enlistment or appointment. When, without being regularly separated, a member of an armed force enlists or accepts an appointment in the same or another armed force without fully disclosing the fact that he has not been so regularly separated, or attempts either such act while in a duty status or while on pass, liberty, or leave, he by that act abandons his status of duty, pass, liberty, or leave, and from that moment becomes absent without leave with respect to the former enlistment or appointment. Similarly, a member of the armed forces absent on a short pass or liberty from his organization who is found on board a ship at sea, without authority, bound for a distant port, may be regarded as having abandoned any authority he might have for his absence and to be absent without proper authority, although he may not have gone beyond the area fixed in the pass and the pass may not have expired.

Intent in desertion by absence with intent to remain away permanently.—If the condition of absence without proper authority is much prolonged and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain absent permanently. However, a plea of guilty of absence without leave to a charge of desertion is not in itself a sufficient basis for a conviction of desertion. No inference of an intent to remain absent permanently arises from any admission involved in the plea, and to warrant a conviction of desertion by absence with intent to remain away permanently evidence of a prolonged absence or of other circumstances must be introduced from which the intent to desert can be inferred. The inference may be drawn from evidence proving that the accused attempted to dispose of his uniform or other military property; that he purchased a ticket for a distant point or was arrested or surrendered at a considerable distance from his station; that while absent he was in the neighborhood of military posts or stations and did not surrender to the military authorities; that he was dissatisfied in his company or on his ship or with the military service; that he had made remarks indicating an intention to desert the service; that he was under charges or had escaped from confinement at the time he absented himself; or that just previous to absenting himself he stole money, civilian clothes, or other property that would assist him in getting away. On the other hand, evidence of previous excellent and long service, that none of the property of the accused was missing from his locker, that he was under the influence of intoxicating liquor or drugs when he absented himself and that he continued for some time under their influence, and similar evidence may be regarded as a basis for a contrary inference. Although the accused may testify that he intended to return, such testimony is not compelling, as the court may believe or reject the testimony of any witness in whole or in part. The fact that a person intends to report or actually reports at another station does not prevent a conviction for desertion, as that fact in connection with other circumstances may tend to establish his intention not to return to his proper place of duty. However, a person absent without leave from his place of service and without funds may report to another station for transportation back to his original place of duty, which circumstance would tend to negative the existence of an intent to desert. No general rule can be laid down as to the effect to be given to an intention to report or an actual reporting at another station.

Intent in desertion by quitting unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service.— In proving a specification alleging that the accused quit his unit or organization or place of duty with the intent to avoid hazardous duty or with the intent to shirk important service, there should be evidence of facts raising a reasonable inference that the accused knew with reasonable certainty that he would be required for such hazardous duty or important service. For example, it might be shown; (*a*) That the accused was personally warned of the imminence of the duty or the service; or (*b*) that his organization, as a whole, was so warned at a formation at which the roll was called and the accused was present; or (*c*) that the period of his absence was of such duration and under such circumstances that the accused must have had reasonable cause to know that he would miss a certain hazardous duty or important service.

b. ATTEMPTING TO DESERT

Discussion.—An attempt to desert is an overt act beyond mere preparation toward accomplishing a purpose to desert. Once the attempt is made the fact that the person desists, either of his own accord or otherwise, does not cancel the offense. The offense of attempting to desert is complete, for example, if the person, intending to desert, hides himself in an empty freight car on a military reservation, intending to effect his escape by being taken away in the car. Entering the car with the intent to desert is the overt act. See the discussion of desertion. For a more detailed discussion of attempts, see 159.

Proof.—(*a*) That the accused made the attempt by doing an overt act or acts; and (*b*) that the attempt was made with the intent to desert. See the comments under proof of desertion.

165. ARTICLE 86—ABSENCE WITHOUT LEAVE

Discussion.—See 164*a*. This article is designed to cover every case not elsewhere provided for in which any member of the armed forces is through his own fault not at the place where he is required to be at a prescribed time. Specific intent is not an element of this offense and proof of the unauthorized absence alone is sufficient to establish a prima facie case. Specific intent is, however, a necessary element of the proof of certain matters in aggravation when alleged in connection with absence without leave. Thus, if it is alleged that an unauthorized absence was with intent to avoid maneuvers or field exercises, it must be proved that the accused absented himself without authority for the purpose of avoiding maneuvers or field exercises. See 154*a* (1) and 154*a* (4). The first part of this article—relating to the properly appointed place of duty—applies whether the place is appointed as a rendezvous for several or for one only. A place of duty is not appointed within the meaning of this article unless the accused has actual or constructive knowledge of the order purporting to appoint such place of duty. Thus it applies in the case of a member of the armed forces failing to report for kitchen police or as a messman, and the second part of the article applies to leaving such duty after reporting.

A member of the armed forces turned over to the civil authorities upon request under Article 14 is not absent without leave while held by them under such delivery. So, also, when a member of the armed forces, being absent with leave, or absent without leave, is held, tried, and acquitted by civil authorities, his status as absent with leave, or absent without leave, is not thereby changed, however long he may be held. If a member of the armed forces is convicted by the civil authorities, the fact that he was arrested, held, and tried does not excuse any unauthorized absence. The status of absence without leave is not changed by an inability to return through sickness, lack of transportation facilities, or other disabilities. But the fact that all or part of a period of unauthorized absence was in a sense enforced or involuntary should be given due weight when considering the type of court to which the case should be referred, or, in the event of conviction, the punishment to be imposed. Where, however, a man on authorized leave is unable to return at the expiration thereof through no fault of his own, he has not committed the offense of absence without leave, there being an excuse for the absence in such a case.

A prisoner whose dismissal, dishonorable, or bad conduct discharge has been executed is no longer a member of the armed forces within the meaning of Article 86. Accordingly, such a prisoner may not be charged with absence without leave under Article 86 but should, if the facts warrant, be charged with escape from confinement under Article 95, or an offense under Article 134. Until actual execution of the dishonorable or bad conduct discharge the prisoner is subject to Article 86, even though the dishonorable or bad conduct discharge may have been ordered executed.

Proof.*—If the accused fails to go to or goes from his appointed place of duty.*—(*a*) That a certain authority appointed a certain time and place for a certain duty by the accused, as alleged; and (*b*) that, without proper authority, the accused failed to go to the appointed place of duty at the time prescribed, or, having so reported, went from that place.

If the accused is charged with absenting himself without proper leave.—(*a*) That the accused absented himself for a certain period from his unit, organization, or other place of duty at which he was required to be, as alleged; and (*b*) that such absence was without proper authority from anyone competent to give him leave.

If the accused is charged with absenting himself without proper leave from his guard, watch, or duty section with intent to abandon the same.—(*a*) That the accused absented himself from his guard, watch, or duty section, as alleged; (*b*) that the absence of the accused was without proper authority; and (*c*) facts and circumstances indicating that the accused intended to abandon his guard, watch, or duty section.

If the accused is charged with absenting himself without proper authority with intent to avoid maneuvers or field exercises.—(*a*)

That the accused absented himself for a certain period from his unit, organization, or place of duty at which he was required to be; (*b*) that the absence of the accused was without proper authority; (*c*) that the accused knew or had good cause to know that such absence would occur during a part of a period of maneuvers or field exercises; and (*d*) facts and circumstances indicating that the accused intended to avoid all or part of a period of maneuvers or field exercises.

In connection with proof of absence without leave, see 143 (Documentary Evidence) and 164*a* (Discussion of absence without leave as an element of desertion).

166. ARTICLE 87—MISSING MOVEMENT

Discussion.—Article 87 denounces "Missing Movement" as the offense committed by any person subject to the code who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required to move in the course of duty.

The word "movement" as used in Article 87 does not include practice marches which are to be of short duration with a return to the point of departure contemplated, nor does it include minor changes in location of ships, aircraft, or units, as when a ship is shifted from one berth to another in the same shipyard or harbor or when a unit is moved from one barracks to another on the same post.

"Through neglect" means the omission by a person to take such measures as are appropriate under the circumstances to assure that he will be present with his ship, aircraft, or unit at the time of a scheduled movement, or his doing of some act without giving attention to its probable consequences in connection with the prospective movement, such as a departure from the vicinity of the prospective movement to such a distance as would make it likely that he could not return in time for the movement.

In order to be guilty of the offense, the accused must know, or have cause to know, of the prospective movement which he is alleged to have missed. Knowledge of the exact hour or even of the exact date of the scheduled movement is not required. It is sufficient if the approximate date is known to the accused. However, there must always be a causal connection between the conduct of the accused and the missing of the scheduled movement. Knowledge of the scheduled movement may be proved by remarks made by the accused to others or by testimony that the accused was informed, directly or indirectly, of the prospective movement. For example, proof that the accused was notified of the prospective movement may consist of evidence that he was present at a roll call, muster, or other formation at which the information was given orally. Proof of general knowledge in the accused's organization of the prospective movement of the ship, aircraft, or unit would justify the assumption by a court of the necessary knowledge on the part of the accused.

That the accused actually missed the movement may be proved by documentary evidence, as by a proper entry in a log or a morning report. This fact may also be proved by the testimony of personnel of the ship, aircraft, or unit (or by other evidence) that the movement occurred at a certain time, together with evidence that the accused was physically elsewhere at that time.

Proof.—(*a*) That the accused actually missed the movement of a ship, aircraft, or unit with which he was required in the course of duty to move; and (*b*) that he missed the movement of the ship, aircraft, or unit through neglect or design.

167. ARTICLE 88—CONTEMPT TOWARDS OFFICIALS

Discussion.—Article 88 denounces the use by any officer of the armed forces of contemptuous words against the President, Vice-President, Congress, Secretary of Defense, or a Secretary of a Department, a Governor, or a legislature of any State, Territory, or other possession of the United States in which such officer is on duty or present.

This article covers both (1) words which are contemptuous in themselves, such as abusive epithets, denunciatory or contemptuous expressions, or intemperate or malevolent comments upon official or personal acts, and (2) words which are contemptuous because of the connection in which they are used and the surrounding circumstances.

The official or groups against whom the words are used must be occupying one of the offices or be one of the groups named in Article 88 at the time of the offense. "Congress" does not include a member as an individual; "legislature" does not include its members individually; nor does "governor" include a "lieutenant governor." However, it is immaterial whether the words are used against the official in his official or private capacity.

The language must be contemptuous and must, by an act of the accused, come to the knowledge of a person other than the accused. Adverse criticism of one of the officials or groups named in the article, in the course of a political discussion, even though emphatically expressed, if not personally contemptuous, may not be charged as a violation of the article. Similarly, expressions of opinion made in a purely private conversation should not ordinarily be made the basis for a court-martial charge. However, giving broad circulation to a written publication containing contemptuous words of the kind made punishable by this article, or the utterance of such contemptuous words in the presence of military inferiors, would constitute an aggravation of the offense.

Truth or falsity of the statements may be immaterial, since the gist of the offense is the contemptous character of the language and the malice with which it is used.

Proof.—(*a*) That the accused used certain contemptuous words against the President, or one of the other authorities mentioned in the article, as alleged; and (*b*) if the words are not in themselves contemptuous, that they were used under certain circumstances or in a certain connection giving them the character of contemptuous words, as alleged.

168. ARTICLE 89—DISRESPECT TOWARDS A SUPERIOR OFFICER

Discussion.—The disrespectful behavior contemplated by this article is such as detracts from the respect due to the authority and person of a superior officer. It may consist of acts or language, however expressed, and it is immaterial whether they refer to the superior as an officer or as a private individual.

It is not essential that the disrespectful behavior be in the presence of the superior, but in general it is considered objectionable to hold one accountable under this article for what was said or done by him in a purely private conversation.

It is not necessary that the "superior officer" be in the execution of his office at the time of the disrespectful behavior. As defined by Article 1 (6), a "superior officer" is an officer who is superior in rank or command. With respect to a person who is a member of one armed force, an officer of another armed force who is duly placed in the chain of command over such person is, within the meaning of Article 89, "*his* superior officer"; but an officer of another armed force would not be "*his* superior officer" merely because of higher rank. The officer toward whom the disrespectful behavior is directed need not, however, be in the chain of command over the accused if both are members of the same armed force and such officer is superior in rank (but not inferior in command) to the accused. Under certain circumstances a superior officer may not be senior in rank; for instance, a line officer, though inferior in rank, may be the commanding officer, and thus the superior, of a staff officer in the organization such as a medical officer.

Disrespect by words may be conveyed by opprobrious epithets or other contemptuous or denunciatory language. Disrespect by acts may be exhibited in a variety of modes—as neglecting the customary salute, by a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer.

If the accused did not know that the person against whom the acts or words were directed was his superior officer, such lack of knowledge is a defense.

Proof.—(*a*) That the accused did or omitted to do certain acts or used certain language to or concerning a certain officer, as alleged; (*b*) that the behavior involved in such acts, omissions, or words was under certain circumstances, or in a certain connection, or with a certain meaning, as alleged; and (*c*) that the officer toward whom the acts, omissions, or words were directed was the superior officer of the accused.

169. ARTICLE 90—ASSAULTING OR WILLFULLY DISOBEYING OFFICER

a. STRIKING OR ASSAULTING SUPERIOR OFFICER

Discussion.—By "superior officer" is meant not only the commanding officer of the accused, whatever may be the relative rank of the two, but any other commissioned officer of rank or command superior to that of the accused. The phrase "his superior officer" in Article 90 has the same meaning as it does in Article 89. See 168. That the accused did not know the officer to be his superior is available as a defense.

The word "strikes" means an intentional blow with anything by which a blow can be given.

The phrase "draws or lifts up any weapon against" covers any simple assault committed in the manner stated. The drawing of any weapon in an aggressive manner or the raising or brandishing of the same in a threatening manner in the presence of the superior, and at him, is the sort of act contemplated. The raising in a threatening manner of a firearm, whether or not loaded, or of a club, or of any implement or thing by which a serious blow could be given, is within the description "lifts up."

The phrase "offers any violence against him" comprises any form of battery or of mere assault not embraced in the preceding more specific terms "strikes" and "draws or lifts up." If not executed, the violence must be physically attempted or menaced. A mere threatening in words is not an offering of violence in the sense of this article.

An officer is in the execution of his office when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage. In general, any striking or use of violence against any superior officer by a person subject to military law, over whom it is the duty of that superior officer to maintain discipline at the time, would be striking or using violence against him in the execution of his office. The commanding officer on board a ship or the commanding officer of a unit in the field is generally considered to be on duty at all times. See 191.

A discharged prisoner or other civilian subject to military law (see Art. 2) and under the command of an officer is subject to the provisions of this article.

In a prosecution for striking or assaulting a superior officer in violation of this article, an accused may establish a defense by proof that the striking or other act of violence was done in legitimate self-defense or in the discharge of some duty such as is enjoined by Article 94.

Proof.—(*a*) That the accused struck a certain officer, or drew or lifted up a weapon against him, or offered violence against him, as alleged; (*b*) that the officer was the superior officer of the accused at the time; and (*c*) that the superior officer was in the execution of his office at the time.

b. DISOBEYING SUPERIOR OFFICER

Discussion.—The willful disobedience contemplated is such as shows an intentional defiance of authority, as when an enlisted person is given a lawful command by an officer to do or cease doing a particular thing at once and refuses or deliberately omits to do what is ordered. A neglect to comply with an order through heedlessness, remissness, or forgetfulness is an offense chargeable under Article 92. If the order to a person is to be executed in the future, a statement by him to the effect that he intends to disobey it is not an offense under Article 90, although carrying out that intention may be. See 168 as to the meaning of the phrase "his superior officer."

The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.

A person cannot be convicted under this article if the order was illegal; but an order requiring the performance of a military duty or act is presumed to be lawful and is disobeyed at the peril of the subordinate. Acts involved in the disobedience of an illegal order might under some circumstances be charged as insubordination under Article 134.

That obedience to a command involved a violation of the religious scruples of the accused is not a defense.

The order must be directed to the subordinate personally. Failure to comply with the general or standing orders of a command, or with the regulations of an armed force, is not an offense under this article, but under Article 92; a nonperformance by a subordinate of any mere routine duty is a violation of Article 92 or Article 134, as the case may be, and not of this article.

As long as it is understandable, the form of an order is immaterial, as is the method by which it is transmitted to the accused, but the communication must amount to an order, and the accused must know that it is from his superior officer, that is, a commissioned officer who is authorized to give the order whether he is superior in rank to the accused or not.

Proof.—(*a*) That the accused received a certain command from a certain officer, as alleged; (*b*) that such officer was the superior officer of the accused; and (*c*) that the accused willfully disobeyed the command.

A command of a superior officer is presumed to be a lawful command.

170. ARTICLE 91—INSUBORDINATE CONDUCT TOWARDS NONCOMMISSIONED OFFICER

a. GENERAL DISCUSSION

Article 91 has the same general objects with respect to warrant officers, noncommissioned officers, and petty officers as Articles 89 and 90 have with respect to commissioned officers, namely, to insure obedience to their lawful orders, and to protect them from violence, insult, or disrespect. The offenses denounced by this article are those committed by a subordinate in his relations to one senior to him. For example, a warrant officer would not be guilty under Article 91 for disobeying the order of a noncommissioned officer or a petty officer, but, if a warrant officer were to fail to obey the lawful order of an armed force policeman of lower grade in the execution of his duty, such warrant officer would be guilty of an offense under Article 92. An assault by a prisoner whose separation from the service has been accomplished, or by any other civilian subject to military law, upon a warrant officer, a noncommissioned officer, or petty officer should be charged under Article 134.

That the accused did not know that the person assaulted was his superior is a defense to a violation of this article. Such lack of knowledge is not a defense, however, as to an included offense which does not depend upon seniority.

The terms "willfully disobeys," "lawful," and "in the execution of his office" are used in the same sense as in Article 90; and the term "order" is used in the same sense as "command" in Article 90.

b. ASSAULTING A WARRANT OFFICER, NONCOMMISSIONED OFFICER, OR PETTY OFFICER

Discussion.—See 170*a*. For the definition of assault, see 207*a*.

Proof.—(*a*) That the accused enlisted person or warrant officer struck or assaulted a certain warrant officer, noncommissioned officer, or petty officer as alleged; and (*b*) that such violence was done while the warrant officer, noncommissioned officer, or petty officer was in the execution of his office.

c. DISOBEYING A WARRANT OFFICER, NONCOMMISSIONED OFFICER, OR PETTY OFFICER

Discussion.—See discussion under 170*a*. The article does not include an acting noncommissioned officer or acting petty officer, nor does it include a military policeman or member of the shore patrol who is not in fact a warrant officer, noncommissioned officer, or petty officer.

Proof.—(*a*) That the accused enlisted person or warrant officer received a certain order from a certain warrant officer, noncommissioned officer, or petty officer, as alleged; and (*b*) that the accused willfully disobeyed the order.

An order from a warrant officer, noncommissioned officer, or petty officer in the execution of his office is presumed to be a lawful order.

d. TREATING WITH CONTEMPT OR BEING DISRESPECTFUL IN LANGUAGE OR DEPORTMENT TOWARD A WARRANT OFFICER, NONCOMMISSIONED OFFICER, OR PETTY OFFICER

Discussion.—The word "toward" read in connection with the phrase "while such officer is in the execution of his office" limits the application of this part of the article to behavior and language within the sight or hearing of the warrant officer, noncommissioned officer, or petty officer concerned.

Proof.—(*a*) That the accused did or omitted to do acts, or used language, under certain circumstances, or in a manner, or with an intended meaning, as alleged; (*b*) that such behavior or language was used toward and within the sight or hearing of a certain warrant officer, noncommissioned officer, or petty officer; and (*c*) that the warrant officer, noncommissioned officer, or petty officer was in the execution of his office at the time.

171. ARTICLE 92—FAILURE TO OBEY ORDER OR REGULATION

a. VIOLATION OR FAILURE TO OBEY A LAWFUL GENERAL ORDER OR REGULATION

Discussion.—A general order or regulation is lawful if it is not contrary to or forbidden by the Constitution, the provisions of an act of Congress or the lawful order of a superior. A general order or regulation is one which is promulgated by the authority of a Secretary of a Department and which applies generally to an armed force, or one promulgated by a commander which applies generally to his command. See 154a(4) (Ignorance of law) as to the necessity of proving actual or constructive knowledge of general orders or regulations in certain cases.

Proof.—(*a*) That there was a certain general order or regulation; and (*b*) that the accused violated or failed to obey the order or regulation.

A general order or regulation is presumed to be lawful.

b. FAILURE TO OBEY OTHER LAWFUL ORDER

Discussion.—This section contemplates all other lawful orders which may be issued by a member of the armed forces, violations of which are not chargeable under Article 90 or Article 91. In order to be guilty of this offense, a person must have had a duty to obey the order and must have had knowledge of the order. Such knowledge may be actual or constructive. Knowledge is "actual" when it is conveyed directly to the accused. It is "constructive" when it is shown that the order was so published that the accused would in the ordinary course of events, or by the exercise of ordinary care, have secured knowledge of the order. Disobedience of the lawful order of one not a superior is chargeable under this article, provided the accused had a duty to obey such order. Examples of orders which a person might have a duty to obey, even though issued by one not a superior, are lawful orders of a sentinel or of members of the armed forces police.

Proof.—(*a*) That a certain lawful order was issued by a member of the armed forces; (*b*) that the accused had knowledge of the order; (*c*) that it was the duty of the accused to obey the order; and (*d*) that the accused failed to obey the order.

The particular order, or specific portion thereof, the accused is charged with having violated should be set forth in the specification in order that the accused may be fully apprised of the offense he is alleged to have committed.

c. DERELICTION IN THE PERFORMANCE OF DUTIES

Discussion.—A duty may be imposed by regulation, lawful order, or custom of the service. A person is derelict in the performance of his duties when he willfully or negligently fails to perform them, or when he performs them in a culpably inefficient manner. When the failure is with full knowledge of the duty and an intention not to perform it, the omission is willful. When the nonperformance is the result of a lack of ordinary care, the omission is negligent. Culpable inefficiency is inefficiency for which there is no reasonable or just excuse. Thus, if it appears that the accused had the ability and opportunity to perform his duties efficiently, but performed them inefficiently nevertheless, he may be found guilty of this offense. However, an accused may not be charged under this article, or punished otherwise, if his failure in the performance of his duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency. For example, a recruit who has earnestly applied himself during rifle training and throughout record firing may not be punished because he fails to qualify with the weapon; nor may a sergeant who, however inefficient, has made an honest effort to maintain direction, be punished for becoming lost with his squad on a maneuver; nor may an artillery battery commander who has zealously applied himself to the instruction of his battery in firing be punished because his battery fails to achieve a satisfactory score in a firing test.

Proof.—(*a*) That the accused had certain prescribed duties; and (*b*) that he was derelict in the performance of those duties.

172. ARTICLE 93—CRUELTY AND MALTREATMENT

Discussion.—Article 93 provides for the punishment of any person subject to the code who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders.

"Any person subject to his orders" means not only those persons under the direct or immediate command of the accused, but extends to all persons who by reason of some duty are required to obey the lawful orders of the accused, whether he is in the direct chain of command over such person or not.

The cruelty, oppression, or maltreatment must be real, although not necessarily physical. To assault and to subject to improper punishment are examples of this offense.

The imposition of necessary or proper duties and the exaction of their performance will not constitute this offense even though such duties are arduous or hazardous or both.

Proof.—(*a*) That a certain person was subject to the orders of the accused; and (*b*) that the accused was cruel toward, or oppressed, or maltreated such person, as alleged.

173. ARTICLE 94—MUTINY AND SEDITION

a. MUTINY

Discussion.—Except when the mutiny is committed by creating violence or disturbance, mutiny imports collective insubordination which necessarily includes some combination of two or more persons in resisting lawful military authority. Such concert of insubordination need not be preconceived nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistent and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent, that is, with an intent to usurp or override lawful military authority. The intent may be declared in words, inferred from acts done, or inferred from surrounding circumstances.

Proof.—(*a*) That the accused created violence or a disturbance, or that he refused, in concert with another person or persons, to obey orders or otherwise do his duty; and (*b*) that he did so with intent to usurp or override lawful military authority.

b. SEDITION

Discussion.—Sedition is the creating, in concert with another or others, of revolt, violence, or other disturbance against lawful civil authority, with intent to cause the overthrow or destruction of such authority. It differs from mutiny in that it implies a resistance to civil power, as distinguished from military power.

Proof.—(*a*) That in concert with another person or persons the accused created revolt, violence or disturbance against lawful civil authority; and (*b*) that he did so with intent to cause the overthrow or destruction of such authority.

c. FAILURE TO PREVENT OR SUPPRESS A MUTINY OR SEDITION

Discussion.—This section of the article requires that persons subject to the code do their "utmost" to prevent and suppress acts of mutiny or sedition being committed in their presence. The word "utmost" imports taking those measures to prevent or suppress a mutiny or sedition which may properly be called for by the circumstances of the situation, having in mind the rank and responsibilities or the employment of the individual concerned. When extreme measures are necessary under the circumstances, the use of a dangerous weapon and the taking of life are required; but the use of more force than is reasonably necessary is an offense. See 198 (Manslaughter).

Proof.—(*a*) The commission of an offense of mutiny or sedition in the presence of the accused; and (*b*) acts or omissions of the accused which constitute a failure to do his utmost to prevent and suppress the mutiny or sedition.

d. FAILURE TO REPORT A MUTINY OR SEDITION

Discussion.—A failure to take "all reasonable means" to inform includes a failure to take the most expeditious means available. When the circumstances known to the accused are such as would have caused a reasonable man in the same or similar circumstances to believe that a mutiny or sedition was taking place, these circumstances will be sufficient to charge the accused with such "reason to believe" as will render him culpable under this article. A failure to report an impending mutiny or sedition is not an offense in violation of Article 94, but it may be an offense in violation of Article 134.

Proof.—(*a*) That an offense of mutiny or sedition occurred; (*b*) that the accused knew or had reason to believe that the offense was taking place; and (*c*) that he failed to take all reasonable means to inform his superior or commanding officer of the offense.

e. ATTEMPTED MUTINY

Discussion.—See 159 (Attempts). An individual may harbor an intent to mutiny and may commit some overt act tending to accomplish that purpose and so be guilty of an attempted mutiny, whether or not a mutiny actually followed.

Proof.—(*a*) A specific intent on the part of the accused to mutiny; and (*b*) an act or acts of the accused which proximately tended to accomplish the mutiny.

174. ARTICLE 95—ARREST AND CONFINEMENT

a. RESISTING APPREHENSION

Discussion.—Resisting apprehension consists of an active resistance to the restraint attempted to be imposed by the person apprehending. Such resistance may be accomplished by flight or by assaulting or striking the person attempting to apprehend. Mere words of remonstrance, argument or abuse, and attempts to escape from custody after the apprehension is complete, will not constitute the offense of resisting apprehension although they may constitute other offenses.

A person cannot be convicted of a violation of this article if the attempted apprehension was in fact illegal. If the accused had no reason to believe that the person attempting to apprehend him was empowered to do so, such fact may be interposed as a defense. See Articles 7 and 8 as to the authority of certain persons to apprehend.

Proof.—(*a*) That one lawfully authorized to do so attempted to apprehend the accused; and (*b*) that the accused resisted the apprehension, as alleged.

b. BREACH OF ARREST

Discussion.—Arrest officially imposed is presumed to be legal. The distinction between arrest and custody or confinement lies in the difference between the kinds of restraint imposed. In arrest the restraint is moral restraint imposed by orders fixing the limits of arrest (18*a*; 20*a*). Custody and confinement import some physical restraint (18*a*; 20*c*).

The offense of breach of arrest is committed when the person in arrest infringes the limits set by orders, and the intention or motive that actuated him is immaterial to the issue of guilt, although proof of inadvertence or bona fide mistake is admissible in extenuation. Innocence of the offense with respect to which an arrest or confinement may have been imposed is not a defense. A person cannot be convicted of a violation of this article if the arrest, custody, or confinement was in fact illegal. However, the circumstances of a breach of an illegal restraint may subject the person breaking such restraint to a prosecution under some other article. For example, if a prisoner in making an escape assaults a sentinel, the fact that the confinement was illegal would not be a defense to a prosecution for the assault. It is immaterial whether the breach of arrest or escape from confinement took place before or after trial, acquittal, or sentence. A violation of a restraint on liberty other than arrest, custody or confinement, as an administrative restriction imposed in the interests of training, discipline, or medical quarantine, or the restraint imposed in lieu of arrest (20*b*) on a prisoner paroled to work within certain limits, should be charged under Article 134. For authority to release from arrest, see 22.

Proof.—(*a*) That the accused was duly placed in arrest; and (*b*) that before he was set at liberty by proper authority he transgressed the limits of his arrest.

c. ESCAPE FROM CONFINEMENT

Discussion.—See 174*b*. Confinement officially imposed is presumed to be legal. An escape may be either with or without force or artifice, and either with or without the consent of the custodian. Any completed casting off of the restraint of confinement, before being set at liberty by proper authority, is an escape from confinement, and lack of effectiveness of the physical restraint imposed is immaterial to the issue of guilt. An escape is not complete until the prisoner has, momentarily, at least, freed himself from the restraint of his confinement; so, if the movement toward escape is opposed, or before it is completed an immediate pursuit follows, there will be no escape until opposition is overcome or pursuit is shaken off. In cases in which the escape is not completed the offense should be charged as an attempt under Article 80.

Proof.—(*a*) That the accused was duly placed in confinement; and (*b*) that he freed himself from the restraint of his confinement before he had been set at liberty by proper authority.

d. ESCAPE FROM CUSTODY

Discussion.—See 174*b*. Custody officially imposed is presumed to be legal. Custody is that restraint of free locomotion which is imposed by lawful apprehension. The restraint may be corporeal and forcible or, once there has been a submission to apprehension or a forcible taking into custody, it may consist of control exercised in the presence of the prisoner by official acts or orders.

Proof.—(*a*) That the accused was duly apprehended by one lawfully authorized to do so; and (*b*) that he freed himself from custody before he had been set at liberty by proper authority.

175. ARTICLE 96—RELEASING PRISONER WITHOUT PROPER AUTHORITY

a. RELEASING A PRISONER WITHOUT PROPER AUTHORITY

Discussion.—The words "any prisoner" include a civilian or military prisoner.

While a provost marshal, commander of a guard, or master-at-arms must receive a prisoner properly committed by any officer, the power of the committing officer ceases as soon as he has committed the prisoner, and he is not, as such committing officer, a "proper authority" to order a release. Normally, the lowest authority competent to order release is the commanding officer of the command of which the prison, stockade, brig, retraining command, or guard holding the prisoner, is a part. See 22.

An officer may receive in his charge a prisoner not committed in strict compliance with the terms of Article 11*a* or other law, and a prisoner having been so received has been "duly committed."

The release of a prisoner is a removal of restraint by the custodian rather than by the prisoner. Circumstances which justify charges against the custodian for release of a prisoner without proper authority will not justify charges against the prisoner for escape from confinement. However, the offense of escape from confinement and that of suffering a prisoner to escape through neglect, or through design, may arise out of the same occurrence.

Proof.—(*a*) That a certain prisoner was duly committed to the charge of the accused; and (*b*) that the accused released him without proper authority.

b. SUFFERING A PRISONER TO ESCAPE THROUGH NEGLECT

Discussion.—See 175*a*. The word "neglect" is here used in the same sense as the word "negligence."

Negligence is a relative term. It is defined in law as the absence of due care. The legal standard of care is that which would have been taken by a reasonably prudent man in the same or similar circumstances. This test applies the standard required of persons acting in the capacity in which the accused was acting. Thus, if the accused is an officer, the test will be, "How would a reasonably prudent officer have acted?" If the circumstances would have indicated to a reasonably prudent officer that a very high order of care was required to prevent escape, then the accused must be held to a very high order of care.

A prisoner cannot be said to have escaped until he has overcome the opposition that restrained him and shaken off immediate pursuit. If he escapes, the fact that he returns, is taken in a fresh pursuit, is killed, or dies is not a defense to a charge of having suffered him to escape through neglect.

Proof.—(*a*) That a certain prisoner was duly committed to the charge of the accused; (*b*) that the prisoner escaped; (*c*) that the accused did not take such care to prevent escape as a reasonably prudent person, acting in the capacity in which the accused was acting, would have taken in the same or similar circumstances; and (*d*) that the escape was the proximate result of the neglect of the accused.

c. SUFFERING A PRISONER TO ESCAPE THROUGH DESIGN

Discussion.—See 175*a* and *b*. In law, a wrongful act is designed when it is intended or when it results from conduct so shockingly and grossly devoid of care as to leave room for no reasonable inference but that the escape was contemplated as a probable result of the course of conduct followed.

It sometimes happens that a prisoner has been permitted larger limits than should have been allowed, and an escape is consummated without hindrance. It does not follow that such an escape is necessarily to be considered as designed. The conduct of the responsible custodian is to be examined in the light of all the circumstances of the case, the gravity of the crime with which the prisoner is charged, the probability of his return, and the intention and motives of the custodian.

Proof.—(*a*) That a certain prisoner was duly committed to the charge of the accused; (*b*) a design of the accused to suffer the escape of that prisoner; and (*c*) that the prisoner escaped as a result of the carrying out of the design of the accused.

176. ARTICLE 97—UNLAWFUL DETENTION OF ANOTHER

Discussion.—Any person subject to the code who, except as provided by law, apprehends, arrests, or confines any person is guilty of unlawful detention under Article 97.

Any unlawful restraint of another's freedom of locomotion will result in a violation of this article. The offense may be committed by one who, being duly authorized to apprehend, arrest, or confine others, exercises such authority unlawfully, or by one not so authorized who effects the restraint of another unlawfully The restraint may be in a guardhouse or a brig, in a house, or in a public street. There need be no actual force exercised in imposing the apprehension, arrest, or confinement. The apprehension, arrest, or confinement must be against the will of the person restrained.

A reasonable belief by the person imposing it, that the restraint was lawful, is a defense.

For persons authorized to apprehend, arrest, or confine, see 19 and 21.

Proof.—(*a*) That the accused apprehended, arrested, or confined a certain person, as alleged; and (*b*) that the accused was not authorized by law to do so.

177. ARTICLE 98—NONCOMPLIANCE WITH PROCEDURAL RULES

a. UNNECESSARY DELAY IN DISPOSING OF CASE

Discussion.—The purpose of this section of Article 98 is to insure expedition in the disposition of cases of persons accused of offenses under the code by providing for the punishment of those responsible for unnecessary delay in the disposition of such cases. A person can be responsible for a delay in the disposition of a case only when his duties require him to act with respect thereto.

Proof.—(*a*) That the accused was charged with certain duties in connection with the disposition of a case of a person accused of an offense under the code; (*b*) that delay occurred in the performance of the duties of the accused regarding the disposition of the case; and (*c*) facts and circumstances showing that the delay was unnecessary and that the accused was responsible therefor.

b. KNOWINGLY AND INTENTIONALLY FAILING TO ENFORCE OR COMPLY WITH PROVISIONS OF THE CODE

Discussion.—This section of the article is not to be construed as applying to cases of bona fide error of law or procedure made before, during, or after a trial. It is designed to punish deliberate and intentional failure to enforce or comply with the provisions of the code regulating the proceedings before, during, and after trial. See particularly Articles 31 and 37.

Proof.—(*a*) That the accused knowingly and intentionally failed to enforce or comply with a certain provision of the code regulating some proceeding before, during, or after a trial, as alleged; and (*b*) that the accused had the duty of enforcing or complying with such provision of the code.

178. ARTICLE 99—MISBEHAVIOR BEFORE THE ENEMY

a. RUNNING AWAY BEFORE THE ENEMY

Discussion.—"The enemy" includes not merely the organized forces of the enemy in time of war, but also imports any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades. Whether a person is "before the enemy" is not a question of definite distance, but is one of tactical relation. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat may be before the enemy although miles from the enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not a part of a tactical operation then going on or in immediate prospect is not "before or in the presence of the enemy" within the meaning of this article.

Proof.—(*a*) That the accused was before or in the presense of an enemy; and (b) that he misbehaved himself by running away.

b. SHAMEFULLY ABANDONING, SURRENDERING, OR DELIVERING UP

Discussion.—This provision concerns primarily commanders chargeable with responsibility for defending a command, unit, place, ship, or military property. Abandonment by a subordinate would ordinarily be charged as running away.

The words "deliver up" are synonymous with "surrender."

Surrender or abandonment of a command, unit, place, ship, or military property by a person charged with its defense can be justified only by the utmost necessity or extremity. Surrender or abandonment without such absolute necessity is shameful within the meaning of this article.

Proof.—(*a*) That the accused was charged by orders or by circumstances with the duty to defend a certain command, unit, place, or ship, or certain military property; (*b*) that without justification he abandoned it or surrendered it; and (*c*) that this act occurred while the accused was before or in the presence of the enemy.

c. ENDANGERING THE SAFETY OF A COMMAND, UNIT, PLACE, OR MILITARY PROPERTY THROUGH DISOBEDIENCE, NEGLECT, OR INTENTIONAL MISCONDUCT

Discussion.—Carelessness or negligence, or other conduct below the standard reasonably expected of the individual under the circumstances, constitutes "neglect" as used in the article. Intentional misconduct implies a wrongful intention and not a mere error in judgment. Under this clause may be charged any act of insubordination, neglect, or intentional misconduct committed by an officer or enlisted person before or in the presence of the enemy which endangers the safety of any command, unit, place, or military property which it is his duty to defend.

Proof.—(*a*) That it was the duty of the accused to defend a certain command, unit, ship, or place, or certain military property; (*b*) that he committed certain disobedience, neglect, or intentional misconduct, as alleged; (*c*) that thereby he endangered the safety of the command, unit, place, ship, or military property; and (*d*) that this act occurred while the accused was before or in the presence of the enemy.

d. CASTING AWAY ARMS OR AMMUNITION

Proof.—(*a*) That the accused was before or in the presence of the enemy; and (*b*) that he cast away certain arms or ammunition, as specified.

e. COWARDLY CONDUCT

Discussion.—Cowardice is misbehavior through fear. Fear is a natural feeling of apprehension when going into battle and the mere display of such apprehension would not constitute the offense, but the refusal or abandonment of a performance of duty before or in the presence of the enemy as a result of fear does constitute the offense.

Proof.—(*a*) That the accused committed an act of cowardice, as alleged; and (*b*) that this act occurred while the accused was before or in the presence of the enemy.

f. QUITTING PLACE OF DUTY TO PLUNDER OR PILLAGE

Discussion.—The essence of this offense is quitting the place of duty with intent to plunder or pillage. The mere quitting with that purpose is sufficient, even though the plunder or pillage may not be consummated.

"Place of duty" includes any place of duty, whether permanent or temporary, fixed or mobile. The words "plunder or pillage" are construed as meaning to seize or appropriate public or private property unlawfully.

Proof.—(*a*) That the accused while before or in the presence of the enemy quit his place of duty; and (*b*) that his intention in so quitting was to seize or appropriate public or private property unlawfully.

g. CAUSING FALSE ALARMS

Discussion.—This clause covers any spreading of false or disturbing rumors or reports, as well as the false giving of established alarm signals.

Proof.—(*a*) That an alarm was caused in a certain command, unit, or place under control of the armed forces; (*b*) conduct of the accused which caused the alarm; (*c*) that the alarm was caused without any reasonable or sufficient justification or excuse; and (*d*) that this act occurred while the accused was before or in the presence of the enemy.

h. WILLFULLY FAILING TO DO UTMOST TO ENCOUNTER, ENGAGE, CAPTURE, OR DESTROY ENEMY TROOPS, COMBATANTS, VESSELS, AIRCRAFT, OR ANY OTHER THING

Proof.—(*a*) That the accused was serving before or in the presence of the enemy; (*b*) that he had a duty to encounter, engage, capture, or destroy certain enemy troops, combatants, vessels, aircraft, or a certain other thing, as alleged; and (*c*) that he willfully failed to do his utmost to perform that duty.

i. NOT AFFORDING ALL PRACTICABLE RELIEF AND ASSISTANCE

Discussion.—This offense is limited to a failure to afford relief and assistance to forces "engaged in battle." When this condition does not exist, this offense cannot be committed. "All practicable relief and assistance" is interpreted to mean all relief and assistance which should be afforded within the limitations imposed upon one by reason of his own specific task or mission. If that task or mission might not brook delay or deviation in order to afford relief and assistance to others, no offense is committed by failing to afford such relief and assistance.

Proof.—(*a*) That certain troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies were engaged in battle and required relief and assistance; (*b*) that the accused was in a position and able to render relief and assistance to such troops, combatants, vessels, or aircraft; (*c*) that the accused failed to afford all practicable relief and assistance, as alleged; and (*d*) that, at the time, the accused was before or in the presence of the enemy.

179. ARTICLE 100—SUBORDINATE COMPELLING SURRENDER

a. SUBORDINATE COMPELLING OR ATTEMPTING TO COMPEL COMMANDER TO SURRENDER OR ABANDON PLACE, PROPERTY, OR COMMAND

Discussion.—In order to constitute an offense under this article, the surrender or abandonment must be compelled or attempted to be compelled by acts rather than words.

The offenses here contemplated are similar to a mutiny or attempted mutiny designed to bring about the surrender or abandonment. Unlike some cases of mutiny, however, concert of action is not an essential element of the offenses under this article. The offense of compelling the giving up or abandonment is not complete until the place, military property or command is abandoned or given up to the enemy. The offense of attempting to compel a surrender or abandonment does not require actual abandonment or surrender, but there must be some act done with this purpose in view, even though it may fall short of an actual accomplishment of the purpose. The words "to give it up to an enemy" are synonymous with "surrender."

Proof.—(*a*) That a certain commander was in command of a certain place, vessel, aircraft, or other military property or of a body of members of the armed forces; and (*b*) acts of the accused compelling the commander to give it up to the enemy or to abandon it, or done with the intent or purpose of compelling such commander to give it up to the enemy or to abandon it.

b. STRIKING THE COLORS OR FLAG

Discussion.—To "strike the colors or flag" is to haul down the colors or flag in the face of the enemy or to make any other offer of surrender. It is a traditional wording for an act of surrender. The offense is committed by any one subject to the code who assumes to himself the authority to surrender a military force or position when he is not authorized to do so either by competent authority or by the necessities of battle. If continued battle has become fruitless and it is impossible to communicate with higher authority, these facts will constitute proper authority to surrender. The offense may be committed wherever there is sufficient contact with the enemy to give the opportunity of making an offer of surrender and it is not necessary that an engagement with the enemy be in progress.

Proof.—(*a*) That there was an offer of surrender to an enemy, as alleged; (*b*) that the accused made or was responsible for the offer; and (*c*) that the accused did not have proper authority to make the offer.

It is unnecessary to prove that the offer was received by the enemy or that it was rejected or accepted. The sending of an emissary charged with making the offer of surrender is an act sufficient to prove the offer, even though the emissary does not reach the enemy.

180. ARTICLE 101—IMPROPER USE OF COUNTERSIGN

a. DISCLOSING THE PAROLE OR COUNTERSIGN TO ONE NOT ENTITLED TO RECEIVE IT

Discussion.—A countersign is a word given from the principal headquarters of a command to aid guards and sentinels in their scrutiny of persons who apply to pass the lines. It consists of a secret challenge and a password. A parole is a word used as a check on the countersign; it is imparted only to those who are entitled to inspect guards and to commanders of guards.

The class of persons entitled to receive the countersign will expand and contract under the varying circumstances of war. Who these persons are will be determined largely, in any particular case, by the general or special orders under which the accused was acting. It is no defense under the terms of this article that the accused did not know that the person to whom he communicated the countersign or parole was not entitled to receive it. Before imparting such a word a person subject to military law must determine at his peril that the person to whom he presumes to make known the word is a person authorized to receive it.

The intent or motive that actuated the accused is immaterial to the issue of guilt, as would also be the circumstance that the imparting was negligent or inadvertent. It is likewise immaterial whether the accused had himself received the password in the regular course of duty or whether he obtained it in some other way.

Proof.—(*a*) That the accused disclosed the parole or countersign to a certain person, known or unknown; and (*b*) that such person was not entitled to receive it.

b. GIVING A PAROLE OR COUNTERSIGN DIFFERENT FROM THAT AUTHORIZED

Proof.—(*a*) That the accused knew he was authorized and required to give a certain parole or countersign; and (*b*) that he gave to a person entitled to receive and use such parole or countersign a different parole or countersign.

181. ARTICLE 102—FORCING A SAFEGUARD

Discussion.—A safeguard is a detachment, guard, or detail posted by a commander for the protection of persons, places, or property of the enemy, or of a neutral affected by the relationship of belligerent forces in their prosecution of war or during circumstances amounting to a state of belligerency. The term also includes a written order left by a commander with an enemy subject or posted upon enemy property for the protection of the individual or property concerned. The effect of a safeguard is to pledge the honor of the nation that the person or property shall be respected by the national armed forces.

Provided that the accused was or should have been aware of the existence of the safeguard, any trespass on the protection of the safeguard will constitute an offense under the article, whether the safeguard was imposed in time of war or in circumstances amounting to a state of belligerency short of a formal state of war.

A safeguard is not a device adopted by a belligerent to protect its own property or nationals or to insure order within its own forces, even though those forces be in a theatre of combat operations, and the posting of guards or of off-limits signs does not establish a safeguard unless the protection thereby afforded is in furtherance of an undertaking by a commander to protect enemy or neutral persons or property.

Proof.—(*a*) That a safeguard had been issued or posted for the protection of a certain person or persons, place or property, as alleged; and (*b*) that, with knowledge of the safeguard, or under circumstances that charged him with notice thereof, the accused performed acts in violation of its protection, as alleged.

182. ARTICLE 103—CAPTURED OR ABANDONED PROPERTY

a. FAILING TO SECURE CAPTURED ENEMY PROPERTY

Discussion.—Immediately upon its capture from the enemy public property becomes the property of the United States. Neither the individual who takes it nor any other person has any private right in such property. On the contrary, every person subject to military law has an immediate duty to take such steps as are within his powers and functions to secure such property to the service of the United States and to protect it from destruction or loss.

The failure to secure captured public property which is punishable by this article consists of a failure to take the steps a reasonably prudent man, acting in the capacity in which the accused was acting, would have taken in the same or similar circumstances to secure the property in question to the service of the United States.

Proof.—(*a*) That certain public property was taken from the enemy; and (*b*) acts or omissions of the accused evidencing a failure by him to perform the responsibilities of a reasonably prudent man acting in his capacity to secure such property for the service of the United States.

The provisions of the article which are discussed in the following subparagraphs are broader than those discussed in *a* in that they pertain to private property as well as to public property.

b. FAILING TO REPORT AND TURN OVER CAPTURED OR ABANDONED PROPERTY

Discussion.—Reports of receipt of captured or abandoned property are to be made direct or through such channels as are required by current regulations or orders or the customs of the service. "Proper authority" is any authority competent to order disposition of the property in question.

Proof.—(*a*) That certain captured or abandoned public or private property came into the possession, custody, or control of the accused; and (*b*) acts or omissions of the accused evidencing his failure to report to proper authority the receipt thereof, and his failure to turn it over as required.

c. DEALING IN CAPTURED OR ABANDONED PROPERTY

Discussion.—All persons subject to the code are forbidden to buy, sell, trade, or in any way deal in or dispose of captured or abandoned property whereby they receive or expect some profit, benefit, or other advantage to themselves or anyone directly or indirectly connected with them. The code prohibits receipt as well as disposition by barter, gift, pledge, lease, or loan. It forbids the destruction or abandonment of the property. The expectation of profit need not be founded on any specific understanding; it is enough if the prohibited act be done for the purpose or in the hope of benefit or advantage, pecuniary or otherwise.

Proof.—(*a*) That the accused bought, sold, traded or otherwise dealt in or disposed of certain public or private captured or abandoned property; and (*b*) that by so doing the accused received or expected some profit, benefit, or advantage to himself or to a certain person or persons connected in a certain manner with himself, as alleged.

d. ENGAGING IN LOOTING OR PILLAGING

Discussion.—The words "looting or pillaging" mean unlawfully seizing or appropriating property which is located in enemy or occupied (friendly or enemy) territory and is either left behind or is owned by, or in the custody of, the enemy or occupied state, its inhabitants, or persons who are under its protection or who, immediately before the place where the act occurred had been occupied, were under the protection of the enemy or occupied state. The unauthorized removal or appropriation of any part of the equipment of a seized or captured vessel or the unlawful seizure or appropriation of property owned by or in the custody of the officers, crew, or passengers on board a seized or captured vessel, constitutes the offense of looting or pillaging wherever the vessel may be located at the time of the offense.

Proof.—(*a*) That the accused unlawfully seized or appropriated certain property; (*b*) that the property was located in enemy or occupied territory, or that it was on board a seized or captured vessel; and (*c*) that the property was left behind—or that it was owned by, or in the custody of, the enemy or occupied state or a person having a certain status with respect to the enemy or occupied state, or that it was part of the equipment of a seized or captured vessel, or was owned by, or in the custody of the officers, crew, or passengers on board a seized or captured vessel, as alleged.

183. ARTICLE 104—AIDING THE ENEMY

This article denounces offenses by all persons whether or not otherwise subject to military law. The trial of offenders may be by court-martial or by military commission.

a. AIDING OR ATTEMPTING TO AID THE ENEMY

Discussion.—"Enemy" imports citizens as well as members of military organizations and does not restrict itself to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and of all the citizens of the other.

It is not a violation of this article, however, to furnish to prisoners of war subsistence, quarters, and other comforts or aid to which they are lawfully entitled.

To aid the enemy as used in this article is equivalent to furnishing it with the arms, ammunition, supplies, money, or other things as denounced in the article. It is immaterial whether the articles furnished are needed by the enemy or whether the transaction is a donation or sale.

Proof.—That the accused either directly or indirectly aided or attempted to aid the enemy with certain arms, ammunition, supplies, money, or other thing, as alleged.

b. HARBORING OR PROTECTING THE ENEMY

Discussion.—See 183*a*. An enemy is harbored or protected when, without proper authority, he is shielded, either physically or by use of any artifice, aid, or representation, from any injury or misfortune which in the chance of war may befall him. It must appear that the offense is knowingly committed, but circumstances sufficient to put a reasonable man on notice will be sufficient to charge the accused with notice.

Proof.—(*a*) That the accused, without proper authority, harbored or protected a certain person; (*b*) that the person so protected was an enemy; and (*c*) that the accused had notice or was chargeable with notice of that fact.

c. GIVING INTELLIGENCE TO THE ENEMY

Discussion.—See 183*a*. This is a particular case of corresponding with the enemy, rendered more heinous by the fact that the communication contains intelligence that may be useful to the enemy for any of the many reasons that make information valuable to belligerents. As in the preceding case, knowledge must be proved, and it is immaterial to the issue of guilt whether the intelligence was conveyed by direct or indirect means. The word "intelligence" imports that the information conveyed is true or implies the truth, at least in part.

Proof.—(*a*) That the accused, without proper authority, knowingly conveyed to the enemy certain information, as alleged; and (*b*) that the information was true or implied the truth, at least in part.

d. COMMUNICATING, CORRESPONDING, OR HOLDING INTERCOURSE WITH THE ENEMY

Discussion.—Communication, correspondence, or holding intercourse with the enemy does not necessarily import a mutual exchange of communication. The law requires absolute nonintercourse, and any unauthorized communication, no matter what may be its tenor or intent, is here denounced. The prohibition lies against any method of intercourse or communication whatsoever, and the offense is complete the moment the communication issues from the accused, whether it reaches its destination or not. The words "directly or indirectly" apply to this offense. It is essential to prove that the offense was knowingly committed.

Citizens of neutral powers resident in or visiting invaded or occupied territory can claim no immunity from the customary laws of war relating to communication with the enemy.

Proof.—(*a*) That the accused, without proper authority, communicated, corresponded, or held intercourse with a certain person; (*b*) that such person was an enemy; and (*c*) that the accused had notice or was chargeable with notice of this fact.

184. ARTICLE 105—MISCONDUCT AS PRISONER

a. ACTING WITHOUT AUTHORITY TO THE DETRIMENT OF ANOTHER FOR THE PURPOSE OF SECURING FAVORABLE TREATMENT

Discussion.—This offense covers all unauthorized conduct by a prisoner of war in the hands of the enemy which tends to ameliorate his condition to the detriment of other prisoners. Such acts may be the reporting of plans of escape being prepared by others or the reporting of secret food caches, equipment, or arms. The acts must be related to the captors, and tend to have the probable effect of bestowing upon the accused some favor with, or advantage from, the captors. The act of the accused must be contrary to law, custom, or regulation. Escape from the enemy is regarded as authorized by custom. An escape, therefore, which results in closer confinement or other measures against fellow prisoners still in the hands of the enemy, is not an offense under this article. The act of the accused must be to the detriment of his fellow prisoners either by way of closer confinement, reduced rations, physical punishment, or other harm.

Proof.—(*a*) That without proper authority the accused acted in a manner contrary to law, custom, or regulation, as alleged; (*b*) that the act was committed while the accused was in the hands of the enemy in time of war; (*c*) that the purpose of the act was to secure favorable treatment of the accused by his captors; and (*d*) that other prisoners held by the enemy suffered some detriment as the proximate result of the accused's act, as alleged.

b. MALTREATING PRISONERS WHILE IN A POSITION OF AUTHORITY

Discussion.—The source of the authority is not material. It may arise from the military rank of the accused, through designation by the captor authorities, or from voluntary election or selection by other prisoners for their self-government.

The maltreatment must be real, although not necessarily physical, and it must be without justifiable cause. Abuse of an inferior by inflammatory and derogatory words may, through mental anguish, constitute this offense. To assault, to strike, to subject to improper punishment, or to deprive of benefits would constitute a maltreatment if done without justifiable cause.

Proof.—(*a*) That the accused maltreated a prisoner held by the enemy, as alleged; (*b*) that the act occurred while the accused was in the hands of the enemy in time of war; (*c*) that the accused held a position of authority over the person maltreated; and (*d*) that the act was without justifiable cause.

185. ARTICLE 106—SPIES

Discussion.—The words "any person who in time of war" bring within the jurisdiction of courts-martial and military commissions all persons of whatever nationality or status who commit the offense of lurking or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces of the United States, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere.

The principal characteristic of this offense is a clandestine dissimulation of the true object sought, which object is an endeavor to obtain information with the intention of communicating it to the hostile party. Thus members of a military organization not wearing disguise, dispatch drivers, whether members of a military organization or civilians, and persons in ships or aircraft who carry out their missions openly and who have penetrated hostile lines are not to be considered spies, for the reason that, while they may have resorted to concealment, they have practiced no dissimulation.

It is necessary to prove an intent to communicate information to the hostile party. This intent will very readily be inferred on proof of a deceptive insinuation of the accused among our forces, but this inference may be overcome by very clear evidence that the person had come within the lines for a comparatively innocent purpose, as to visit his family or to reach his own lines by assuming a disguise.

It is not essential that the accused obtain the information sought or that he communicate it. The offense is complete with the lurking or dissimulation with intent to accomplish these objects.

A spy who, after rejoining the armed force to which he belongs, is subsequently captured by the enemy incurs no responsibility for his previous acts of espionage.

A person living in occupied territory who, without dissimulation, merely reports what he sees or what he hears through agents to the enemy may be charged under Article 104 with giving intelligence to or communicating with the enemy, but he may not be charged under this article with being a spy.

Proof.—(*a*) That the accused was found at a certain place within our zone of operations, acting clandestinely or under false pretenses; and (*b*) that he was obtaining, or endeavoring to obtain, information with intent to communicate it to the enemy.

186. ARTICLE 107—FALSE OFFICIAL STATEMENTS

Discussion.—Official documents and official statements include all documents and statements made in the line of duty.

The false representation must be made officially with the intent to deceive, and it must be one which the accused does not believe to be true. The relative rank of the person intended to be deceived is immaterial if that person was authorized in the execution of his office to require the statement or document from the accused. The expectation of material gain is not one of the essential elements of the offense.

Proof.—(*a*) That the accused signed a certain official document or made a certain official statement, as alleged; (*b*) that the document or statement was false in certain particulars, as alleged; (*c*) that the accused knew it to be false at the time of signing or making it; and (*d*) that such false document or statement was made with the intent to deceive.

187. ARTICLE 108—MILITARY PROPERTY OF UNITED STATES—LOSS, DAMAGE, DESTRUCTION, OR WRONGFUL DISPOSITION

a. SELLING OR OTHERWISE DISPOSING OF MILITARY PROPERTY

Discussion.—Article 108 applies to the act of any person subject to the code, and it is immaterial whether the property sold, disposed of, destroyed, lost, or damaged had been issued at all or whether the property was issued to someone other than the accused.

Proof.—(*a*) That the accused sold or otherwise disposed of certain property, as alleged; (*b*) that the sale or disposition was without proper authority; (*c*) that the property was military property of the United States; and (*d*) the value of the property, as alleged.

For a discussion of proof of value, see 200*a* (Proof).

b. WILLFULLY OR THROUGH NEGLECT DAMAGING, DESTROYING, OR LOSING MILITARY PROPERTY

Discussion.—See 187*a*. A willful damage, destruction, or loss is one that is intentionally occasioned. Loss, destruction, or damage is occasioned through neglect when it is the result of a want of such attention to the nature or foreseeable consequences of an act or omission as was appropriate under the circumstances.

If it is shown by either direct or circumstantial evidence that the property was issued to the accused, it may be presumed that the damage, destruction, or loss shown, unless satisfactorily explained, was due to the neglect of the accused. The rule of this subparagraph applies only to items of individual issue.

Proof.—(*a*) That, without proper authority, the accused damaged or destroyed certain property in a certain way, or lost it, as alleged; (*b*) that the property was military property of the United States; (*c*) that the damage, destruction, or loss was willfully caused by the accused in a certain manner, as alleged; or that the damage, destruction, or loss was the result of neglect on the part of the accused; and (*d*) the value of the property destroyed or lost, or the amount of damage, as alleged.

For a discussion of proof of value, see 200*a* (Proof).

c. SUFFERING THE LOSS, DAMAGE, DESTRUCTION, SALE, OR WRONGFUL DISPOSITION OF MILITARY PROPERTY

Discussion.—See 187*a*. The loss, damage, destruction, sale, or disposition may be said to be willfully suffered by one who, knowing the act to be imminent or actually going on, takes no steps to prevent it, as by a sentinel who, seeing a small and readily extinguishable fire in a stack of hay on his post, allows the hay to burn, or a member of the boat crew, who seeing a small boat tied alongside, allows the boat to be damaged or lost by chafing or striking. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a loss, damage, destruction, sale, or wrongful disposition.

The willful or neglectful sufferance specified by the article may consist in a deliberate violation or positive disregard of some specific injunction of law, regulations, or orders; or it may be evidenced by such circumstances as a reckless or unwarranted personal use of the property, causing or allowing it to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be consumed, wasted, or injured by other persons; or by loaning it to a person, known to be irresponsible, by whom it is damaged.

Proof.—(*a*) That certain military property of the United States was lost, damaged, destroyed, sold, or wrongfully disposed of in the manner alleged; (*b*) that such loss, damage, destruction, sale, or disposition was suffered by the accused without proper authority, through a certain omission of duty on his part; (*c*) that such omission was willful or negligent as alleged; and (*d*) the value of the property lost, destroyed, sold, or wrongfully disposed of, or the amount of damage, as alleged.

Although there may be no direct evidence that the property in question was military property of the United States, still circumstantial evidence such as evidence that the property was of a type and kind issued for use in, or furnished and intended for, the military service of the United States, might, together with other proved circumstances, warrant the court in inferring that it was such military property.

In the case of loss, destruction, sale, or wrongful disposition, the value of the property controls the limit of punishment which may be adjudged therefor, but in the case of damage, the amount of damage instead of the value of the property damaged is controlling. As a general rule, the amount of damage is the estimated or actual cost of repair by the governmental agency normally employed in such work, or the cost of replacement, as shown by government price lists or otherwise, whichever is the lesser. For a further discussion of proof of value, see 200*a* (Proof).

188. ARTICLE 109—PROPERTY OTHER THAN MILITARY PROPERTY OF UNITED STATES—WASTE, SPOIL, OR DESTRUCTION

a. WASTING OR SPOILING PROPERTY OTHER THAN MILITARY PROPERTY OF THE UNITED STATES

Discussion.—The terms "wastes" and "spoils" as used in this article refer to such wrongful acts of voluntary destruction of or permanent damage to real property as burning down buildings, burning piers, tearing down fences, or cutting down trees. This destruction is punishable whether done willfully, that is intentionally, or recklessly, that is through a disregard for the probably destructive results of some voluntary act.

Proof.—(*a*) That the accused willfully or recklessly wasted or spoiled certain property in the manner alleged; and (*b*) the value of the property wasted or spoiled, as alleged.

For a discussion of proof of value, see 200*a* (Proof).

b. WILLFULLY AND WRONGFULLY DESTROYING OR DAMAGING OTHER THAN MILITARY PROPERTY OF THE UNITED STATES

Discussion.—To be destroyed, the property need not be completely demolished or annihilated, but need be only sufficiently injured to be useless for the purpose for which it was intended. Damage consists of any physical injury to the property. The article denounces destruction or damage to property through willful and wrongful misconduct, but a reckless disregard of property rights may be of such a high degree as to carry an implication of willfulness.

In the case of destruction, the value of the property destroyed controls the limit of punishment which may be adjudged therefor, but in the case of damage, the amount thereof instead of the value of the property damaged is so controlling. As a general rule, the amount of damage is the estimated or actual cost of repair by artisans employed in such work who are available to the community wherein the owner resides, or the replacement cost, whichever is the lesser.

Proof.—(*a*) That the accused destroyed or damaged certain property, as alleged; (*b*) that such destruction or damage was willful and wrongful, and (*c*) the value of the property destroyed or the amount of damage done, as alleged.

For a discussion of proof of value, see 200*a* (Proof).

189. ARTICLE 110—IMPROPER HAZARDING OF VESSEL

Discussion.—As used in this article, "willfully" means intentionally and "wrongfully" means contrary to law, regulation, lawful order, or custom. "Negligence" under this article means the failure to exercise the care, prudence, or attention to duties, which the interests of the Government require to be exercised by a prudent and reasonable person under the circumstances. Such negligence may consist of the omission to do something the prudent and reasonable person would have done, or the doing of something he would not have done under the circumstances. The words "to suffer" mean to allow or to permit, and a ship is willfully suffered to be hazarded by one who, although not in direct control of the vessel, knows a danger to be imminent but takes no steps to prevent it, as by a plotting officer of a ship under way who fails to report to the officer of the deck a radar target which he observes to be on a collision course with, and dangerously close to, his own ship. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a foreseeable danger. "Hazard" means to put in danger of loss or injury; actual damage to, or loss of, a vessel of the armed forces by collision, stranding, running upon a shoal or a rock, or by any other cause, is conclusive evidence that such vessel was hazarded although not of the fact of culpability on the part of any particular person. "Stranded" means run aground so that the vessel is fast for a time. If a vessel "touches and goes," she is not stranded; if she "touches and sticks," she is. A shoal is a sand, mud, or gravel bank or bar that makes the water shallow.

No person is relieved of culpability who fails to perform duties such as are imposed upon him by the general responsibilities of his grade or rank, or by the customs of the service for the safety and protection of vessels of the armed forces, simply because such duties are not specifically enumerated in a regulation or an order. However, a mere error in judgment such as a reasonably able person might have committed under the same circumstances, will not constitute an offense under this article.

Proof.—(*a*) That a vessel of the armed forces was hazarded in a certain manner, as alleged; and (*b*) that the accused, by certain acts or omissions, as alleged, willfully and wrongfully, or negligently, caused or suffered such vessel to be so hazarded.

190. ARTICLE 111—DRUNKEN OR RECKLESS DRIVING

Discussion.—Article 111 defines the offense of drunken or reckless driving as operating any vehicle while drunk, or in a reckless or wanton manner.

Operating a vehicle includes not only driving or guiding it while in motion, either in person or through the agency of another, but also the setting of its motive power in action or the manipulation of its controls so as to cause the particular vehicle to move. The term "vehicle" is not restricted to motor driven or passenger carrying vehicles nor does it describe only types of land transportation.

As to the meaning of "drunk," see 191.

The operation of a vehicle is "reckless" when it exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. Recklessness is not determined solely by reason of the happening of an injury, or the invasion of the rights of another, nor by proof alone of excessive speed or erratic operation, but all such factors may be admissible and relevant as bearing upon the ultimate question: Whether, under all the circumstances, the accused's manner of operation of the vehicle was of that heedless nature which made it actually or imminently dangerous to the occupants, or to the rights or safety of others. It is driving with such a high degree of negligence that if death were caused, the accused would have committed involuntary manslaughter, at least.

"Wanton" includes "reckless," but in describing the operation of a vehicle, may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense (see 197*f*).

While the same course of conduct may constitute both drunken and reckless driving, the article proscribes these as separate offenses, and both offenses may be charged. However, as recklessness is a relative matter, evidence of all the surrounding circumstances which made the operation dangerous, whether alleged or not, may be competent. Thus, on a charge of reckless driving, evidence of drunkenness might be admissible as establishing one aspect of the recklessness, and evidence that the vehicle exceeded a safe speed, at a relevant prior point and time, as corroborating other evidence of the specific recklessness charged. Similarly, on a charge of drunken driving, relevant evidence of recklessness might have probative value as corroborating other proof of drunkenness.

The condition of the surface on which the vehicle is operated, the time of day or night, the traffic, and the condition of the vehicle are often matters of prime importance in the proof of an offense charged under this article, and where they are of importance, may properly be alleged.

Proof.—(*a*) That the accused was operating a certain vehicle, as alleged; and (*b*) that he was drunk while operating the vehicle; or, that he operated it in a reckless or wanton manner, as alleged.

191. ARTICLE 112—DRUNK ON DUTY

Discussion.—Article 112 sets forth the offense of being found drunk on duty. The term "duty" as used in this article means military duty, but it is important to note that every duty which an officer or enlisted person may legally be required by superior authority to execute is necessarily a military duty.

Whether the drunkenness was caused by liquor or drugs is immaterial; and any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article.

It is necessary that accused be found drunk while actually on the duty alleged, and the fact that he became drunk before going on duty, although material in extenuation, does not affect the question of his guilt. If, however, he does not undertake the responsibility or enter upon the duty at all, his conduct does not fall within the terms of this article, nor does that of a person who absents himself from his duty and is found drunk while so absent. Included within the article is drunkenness while on duty of an anticipatory nature such as that of an aircraft crew ordered to stand by for flight duty, or of an enlisted person ordered to stand by for guard duty.

Within the meaning of this article, when in the actual exercise of command, the commanding officer of a post, or of a command, or of a detachment in the field is constantly on duty. Also, within the meaning of this article, the commanding officer on board a ship is constantly on duty. In the case of other officers or enlisted persons the term "on duty" relates to duties of routine or detail, in garrison, at a station, or in the field, and does not relate to those periods when, no duty being required of them by orders or regulations, officers and men occupy the status of leisure known as "off duty" or "on liberty."

In a region of active hostilities, the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article. So also, an officer of the day and members of the guard, or of the watch, are on duty during their entire tour within the meaning of this article.

Proof.—(*a*) That the accused was on a certain duty, as alleged; and (*b*) that he was found drunk while on that duty.

192. ARTICLE 113—MISBEHAVIOR OF SENTINEL OR LOOKOUT

Discussion.—This article defines three kinds of misbehavior committed by sentinels or lookouts: Being found drunk or sleeping upon post, or leaving it before being regularly relieved. As to the meaning of "drunk," see 191.

A post is not limited by an imaginary line, but includes, according to orders or circumstances, such surrounding area as may be necessary for the proper performance of the duties for which the sentinel or lookout was posted. The sentinel or lookout who goes anywhere within that area for the discharge of his duties does not leave his post, but if found drunk or sleeping within the area may be convicted of a violation of this article. The offense of leaving post is not committed when a sentinel or lookout goes an immaterial distance from the point, station, area, or object which was prescribed as his post, unless he goes such a distance that his ability fully to perform the duty for which he was posted is impaired.

A sentinel or lookout is on post within the meaning of this article not only when he is at a post physically defined, as is ordinarily the case in garrison or aboard ship, but also, for example, when he may be stationed in observation against the approach of an enemy, or detailed to use any equipment designed to locate friend, foe, or possible danger, or at a designated place to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work.

This article does not include an officer or enlisted person of the guard, or of a ship's watch, not posted or performing the duties of a sentinel or lookout, nor does it include a person whose duties as a watchman or attendant do not require that he be constantly alert.

The fact that the sentinel or lookout is not posted in the regular way is not a defense. It is sufficient, for example, if he has taken his post in accordance with proper instruction, whether or not formally given.

Proof.—(*a*) That the accused was posted or on post as a sentinel or lookout, as alleged; and (*b*) that he was found drunk while on his post, or was found sleeping while on his post, or that he left his post before being regularly relieved.

193. ARTICLE 114—DUELING

a. FIGHTING A DUEL

Discussion.—A duel is a combat between two persons for private reasons fought with deadly weapons by prior agreement.

Proof.—(*a*) That the accused fought another person for private reasons with deadly weapons; and (*b*) that the combat was by prior agreement.

b. PROMOTING, BEING CONCERNED IN, OR CONNIVING AT FIGHTING A DUEL, OR FAILING TO REPORT KNOWLEDGE OF A CHALLENGE

Discussion.—Urging or taunting another to challenge or to accept a challenge to duel, acting as a second or as carrier of a challenge or acceptance, or otherwise furthering or contributing toward the fighting of a duel are examples of promoting a duel. Anyone who has reason to believe steps are being or have been taken toward arranging or fighting a duel and who fails to notify appropriate authorities and to take other reasonable preventive action thereby connives at the fighting of a duel. Knowledge creates an obligation to act; the failure so to do constitutes a crime.

Proof.—That the accused promoted, was concerned in, or connived at the fighting of a duel by taunting another to challenge, acting as a second, failing to bring knowledge possessed by him of an intended duel to the attention of the authorities, or otherwise, as alleged.

194. ARTICLE 115—MALINGERING

Discussion.—Malingering is defined in this article as feigning illness, physical disablement, mental lapse or derangement, or intentionally inflicting self-injury, for the purpose of avoiding work, duty, or service.

The essence of this offense is the design to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service. Whether to avoid all duty, or only a particular job, it is the purpose to shirk which characterizes the offense. Hence, the nature or permanency of a self-inflicted injury is not material on the question of guilt, nor is the seriousness of a physical or mental disability which is a sham. Evidence of the extent of the self-inflicted injury or feigned disability may, however, be relevant as a factor indicating the presence or absence of the purpose.

A qualified medical expert may testify concerning his opinion as to whether a purported illness of the accused was feigned (see 138*e*), and such an opinion may be regarded as evidence upon that question.

Proof.—(*a*) That the accused was assigned to, or was aware of his prospective assignment to, or availability for, the performance of work, duty, or service, as alleged; (*b*) that the accused feigned illness, physical disablement, mental lapse or derangement, or intentionally inflicted injury upon himself, as alleged; and (*c*) facts and circumstances showing that his purpose in doing so was to avoid the work, duty, or service alleged.

195. ARTICLE 116—RIOT OR BREACH OF PEACE

a. RIOT

Discussion.—The term "riot" denotes a breach of the peace committed by three or more persons in furtherance of a common purpose to execute some enterprise by concerted action against any who may oppose them. As to breach of the peace, see 195*b*.

Without such a common purpose to be effected by concerted action, the acts of a tumultuous assembly of three or more persons, even though all commit breaches of the peace, do not constitute a riot. For example, in the case of an assemblage of persons engaged in discharging cannon crackers in violation of law, it was held that each person was intent on discharging his own cannon crackers and that there was no intent among the persons so assembled mutually to assist each other.

It is not necessary that the common purpose be determined prior to assembly; it is sufficient if the assemblage actually begins to execute in a tumultuous manner a common purpose formed after it assembled.

Proof.—(*a*) That the accused was a member of an assemblage of three or more persons; (*b*) that he caused or participated in a certain breach of the peace committed by the assemblage, as alleged (195*b*); (*c*) facts and circumstances showing that the breach of the peace was committed in furtherance of a common purpose to execute an enterprise by concerted action against all opposition.

b. BREACH OF THE PEACE

Discussion.—In military law, a "breach of the peace" is an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature.

Not every type of disorder or misconduct is a breach of the peace. For example, a soldier appearing in an unclean uniform in a public place might commit an offense in violation of Article 134, but this act would not ordinarily tend to a disturbance of the peace. The acts or conduct contemplated by this article are those which disturb the public tranquility or impinge upon the peace and good order to which the community is entitled. The words "community" and "public" include within their meaning a military organization, post, camp, ship, or station.

Engaging in an affray, unlawful discharge of firearms in a public street, and the use of vile or abusive words to another in a public place are a few instances of the type of conduct which may constitute a breach of the peace. The fact that opprobrious words are true, or used under provocation, is not a defense, nor is tumultuous conduct excusable because incited by others. As to self-defense, see 197*c*, 207*a*.

Proof.—(*a*) That the accused caused or participated in a certain act of a violent or turbulent nature, as alleged; and (*b*) facts and circumstances surrounding the incident which show that the peace was thereby unlawfully disturbed.

196. ARTICLE 117—PROVOKING SPEECHES OR GESTURES

Discussion.—This article makes punishable the use of provoking or reproachful words or gestures towards another person subject to the code.

As used in this article, "provoking" and "reproachful" describe those words or gestures which are used in the presence of the person to whom they are directed and which tend to induce breaches of the peace. As thus used they do not comprehend reprimands, censures, reproofs and the like which may properly be administered in the interests of training, efficiency, or discipline in the armed forces.

Proof.—That the accused wrongfully used certain provoking or reproachful words or gestures towards another person subject to the code, as alleged.

197. ARTICLE 118—MURDER

Discussion.—*a. General.*—The killing of a human being is unlawful when done without justification or excuse. The determination of whether an unlawful killing constitutes murder or a lesser offense (see 198) depends upon the circumstances under which it occurred. The offense is committed at the place of the act or omission although the victim may have died elsewhere. Whether death occurs at the time of the accused's act or omission, or at some time thereafter, it must have followed from an injury received by the victim which resulted from such act or omission.

b. Justification.—A homicide committed in the proper performance of a legal duty is justifiable. Thus executing a person pursuant to a legal sentence of death, killing in suppression of a mutiny or riot, killing to prevent the escape of a prisoner if no other reasonably apparent means are adequate, killing an enemy in battle, and killing to prevent the commission of an offense attempted by force or surprise such as burglary, robbery, or aggravated arson, are cases of justifiable homicide.

The general rule is that the acts of a subordinate, done in good faith in compliance with his supposed duty or orders, are justifiable. This justification does not exist, however, when those acts are manifestly beyond the scope of his authority, or the order is such that a man of ordinary sense and understanding would know it to be illegal, or the subordinate willfully or through negligence does acts endangering the lives of innocent parties in the discharge of his duty to prevent escape or effect an arrest.

c. Excuse.—A homicide which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense, is excusable. Thus, if a lawful operation, performed with due care and skill, causes the death of a patient, the homicide is excusable. To excuse a person for a killing on the ground of self-defense, he must have believed on reasonable grounds that killing was necessary to save his life or the lives of those whom he might lawfully protect, or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house or at a place where he has a duty to remain, has retreated as far as he safely can. To avail himself of the right of self-defense, the person doing the killing must not have been the aggressor or intentionally provoked the altercation; but if after provoking a fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor.

d. Premeditation.—A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended. It is not necessary that the intention to kill shall have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution. Evidence that a participant in a quarrel, who was surprised by a policeman hailing him unexpectedly, turned and shot the policeman, has been held not to show premeditation. On the other hand, premeditation could be inferred if the accused shot a policeman as part of a plan to escape arrest.

e. Intent to kill or inflict great bodily harm.—An unlawful killing without premeditation is also murder when the person had either an intent to kill or an intent to inflict great bodily harm. Great bodily harm refers to serious injuries; it does not include minor injuries such as a black eye or a bloody nose (see 207*b*). A person is presumed to have intended the natural and probable consequences of an act purposely done by him. Hence, if a person does an intentional act likely to result in death or great bodily injury, he may be presumed to have intended death or great bodily harm. The intent need not be directed toward the person killed nor must it exist for any particular time before commission of the act, or have previously existed at all. It is sufficient that it existed at the time of the act or omission (except if death be inflicted in the heat of a sudden passion caused by adequate provocation—see 198*a*). For example, a person perpetrating housebreaking who struck and killed the householder attempting to block his flight would be guilty of murder even if he did not see the householder until the moment before swinging his weapon at him.

f. Act inherently dangerous with wanton disregard of human life.—Engaging in an act inherently dangerous to others, without any intent to cause the death of, or great bodily harm to, any particular person, or even with a wish that death may not be caused, may also constitute murder if the performance of the act shows a wanton disregard of human life. Such disregard is characterized by a heedlessness of the probable consequences of the act or omission, an indifference that death or great bodily harm may ensue. Examples might be throwing a live grenade toward another in jest, or flying an aircraft very low over a crowd to make it scatter.

g. Commission of certain offenses.—A homicide committed during the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson also constitutes murder, and it is immaterial that the slaying may be unintentional or even accidental. Experience has shown that the commission or attempted commission of these offenses is likely to result in homicide. The law recognizes this probability, and when an unlawful killing occurs as a consequence of the perpetration or attempted perpetration of one of these offenses, the killing is murder. The perpetration or attempted perpetration of the burglary, sodomy, rape, robbery, or aggravated arson, as the case may be, should be charged in a separate specification.

Proof.—(*a*) That the victim named or described is dead; (*b*) that his death resulted from the act or omission of the accused, as alleged; and (*c*) facts and circumstances showing that the accused had a premeditated design to kill; or intended to kill or inflict great bodily harm; or was engaged in an act inherently dangerous to others, evincing a wanton disregard of human life; or was engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson.

Among the offenses which may be included in a particular charge of murder are manslaughter, negligent homicide in violation of Article 134, assault with intent to murder, and certain forms of assault.

198. ARTICLE 119—MANSLAUGHTER

a. VOLUNTARY MANSLAUGHTER

Discussion.—An unlawful killing, although done with an intent to kill or inflict great bodily harm (see 197*e*), is not murder but voluntary manslaughter if committed in the heat of sudden passion caused by adequate provocation. The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion caused by such provocation, although not in necessary defense of life nor to prevent bodily harm (see 197*c*, 207*a*), he may strike a fatal blow before he has had time to control himself. While the law does not excuse the homicide because of the provocation, it does not hold him guilty of murder.

The provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man, and the act of killing must be committed under and because of the passion. The provocation must not be sought or induced as an excuse for killing or doing harm. If, judged by the standard of a reasonable man, sufficient cooling time elapses between the provocation and the killing, it is murder, even if the passion of the particular accused persists.

Instances of adequate provocation are: Assault and battery inflicting great or grievous bodily harm, an unlawful imprisonment, and the sight by a husband or wife of an act of adultery committed by his or her spouse. If the person so assaulted or imprisoned, or the husband or wife so situated, at once kills the offender or offenders in the heat of sudden passion caused by their act, voluntary manslaughter only has been committed. Insulting or abusive words or gestures, a slight blow with the hand or fist, and trespass or other injury to property are not, standing alone, considered adequate provocation.

Among the offenses which may be included in a particular charge of voluntary manslaughter are involuntary manslaughter, negligent homicide in violation of Article 134, assault with intent to commit voluntary manslaughter, aggravated assault, assault and battery, and assault.

b. INVOLUNTARY MANSLAUGHTER

Discussion.—Involuntary manslaughter is an unlawful homicide (see 197*a*) committed without an intent to kill or inflict great bodily harm; it is an unlawful killing by culpable negligence, or while perpetrating or attempting to perpetrate an offense other than burglary, sodomy, rape, robbery, or aggravated arson, directly affecting the person.

Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of such act or omission. Thus the basis of a charge of involuntary manslaughter may be a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not, necessarily, be a natural and probable consequence of such act or omission.

Instances of culpable negligence are: Negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous; carelessly leaving poisons or dangerous drugs where they may endanger life.

When there is no legal duty to act there can, of course, be no neglect. Thus when a stranger makes no effort to save a drowning man, or a person allows a mendicant to freeze or starve to death, no crime is committed.

By an offense directly affecting the person is meant one affecting some particular person as distinguished from an offense affecting society in general. Among offenses directly affecting the person are the various types of assault, battery, false imprisonment, voluntary engagement in an affray, the use of more force than is reasonably necessary in the suppression of a mutiny or riot, and maiming.

Among the offenses which may be included within a particular charge of involuntary manslaughter are negligent homicide in violation of Article 134, assault and battery, and assault.

Proof.—(*a*) That the victim named or described is dead; (*b*) that his death resulted from the act or omission of the accused, as alleged; and (*c*) facts and circumstances showing that the homicide amounted in law to the degree of manslaughter alleged.

199. ARTICLE 120—RAPE AND CARNAL KNOWLEDGE

a. RAPE

Discussion.—This article defines rape as the commission of an act of sexual intercourse by a person with a female not his wife, by force and without her consent. It may be committed on a female of any age. Force and want of consent are indispensable to the offense, but the force involved in the act of penetration will suffice if there is no consent. Any penetration, however slight, is sufficient to complete the offense (Art. 120*c*).

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and if a woman fails to take such measures to frustrate the execution of a man's design as she is able to take and are called for by the circumstances, the inference may be drawn that she did in fact consent. All the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm.

It has been said of this offense, "It is true that rape is a most detestable crime . . .; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent."

If there be actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the woman is of unsound mind or unconscious to an extent rendering her incapable of giving consent, the act is rape. Likewise, the acquiescence of a female child of such tender years that she is incapable of understanding the nature of the act, is not consent. A woman's prior lack of chastity is not a defense, but see 153*b* (2) (*b*) as to the admissibility of evidence of her unchaste character.

Among the offenses which may be included in a particular charge of rape are assault with intent to commit rape, assault and battery, and assault.

Proof.—(*a*) That the accused had sexual intercourse with a certain female not his wife; and (*b*) that the act was done by force and without her consent.

b. CARNAL KNOWLEDGE

Discussion.—Carnal knowledge is defined as the commission of an act of sexual intercourse under circumstances not amounting to rape, by a person with a female not his wife who has not attained the age of 16 years. As in rape, any penetration is sufficient to complete the offense (Art. 120*c*).

It is no defense that the accused is ignorant or misinformed as to the true age of the female, or that she was of prior unchaste character; it is the fact of the girl's age and not his knowledge or belief which fixes his criminal responsibility. Evidence of such matters should, however, be considered in determining an appropriate sentence.

An accused does not violate this article by committing an act of sexual intercourse with a female of 16 years or over. However, if the statute of a jurisdiction denounces sexual intercourse with a female under a certain age greater than 16 years, the violation of such a statute within the territorial limits of the jurisdiction by a person subject to the code may constitute conduct bringing discredit upon the armed forces in violation of Article 134.

Proof.—(*a*) That the accused had sexual intercourse with a certain female not his wife; and (*b*) that she had not attained the age of 16 years.

200. ARTICLE 121—LARCENY AND WRONGFUL APPROPRIATION

a. LARCENY

Discussion.—(1) *General.*—Under the provisions of Article 121, a person is guilty of larceny if he wrongfully takes, obtains, or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, or article of value of any kind, with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner. A wrongful taking with intent permanently to deprive includes the common law offense of larceny; a wrongful obtaining with intent permanently to defraud includes the offense formerly known as obtaining by false pretense; and a wrongful withholding with intent permanently to appropriate includes the offense formerly known as embezzlement. Any of the various acts denounced as larceny by Article 121 may be charged and proved under a specification alleging that the accused stole the property in question.

Property which is taken, obtained, or withheld by severing it from real estate is within the class of property which may be the subject of larceny. Also within this class of property are writings which represent value, such as commercial paper.

(2) *Taking, obtaining, or withholding.*—There must be a taking, obtaining, or withholding of the property by the thief. For instance, there is no taking if the property is connected to a building by a chain and the property has not been disconnected from the building; and property is not "obtained" by merely acquiring title thereto without exercising some possessory control over it. As a general rule, however, any movement of the property or any exercise of dominion over it by any means is sufficient if accompanied by the requisite intent. Thus, if a person entices another's horse into his own stable without touching the animal, or procures a railroad company to deliver to him another's trunk by changing the check on it, or obtains the delivery of another's goods to a person or place designated by him, or has the funds of another transferred to his own bank account, he is guilty of larceny if other elements of the offense are present. A person may "obtain" the property of another by acquiring possession without title, and one who already has possession of the property of another may "obtain" it by thereafter acquiring title thereto. A withholding may arise either as a result of a failure to return, account for or deliver property to its owner when a return, accounting, or delivery is due or as a result of devoting property to a use not authorized by its owner, and this is so even though the owner had made no demand for the property and even though initially the property had come lawfully into the hands of the person thus withholding it. The taking, obtaining, or withholding must be of specific property. A debtor does not withhold specific property from the possession of his creditor by failing or refusing to pay a debt, for, prior to payment, the relationship of debtor and creditor does not give the creditor a possessory right in any specific money or other property of the debtor.

(3) *Ownership of the property.*—Article 121 requires that the taking, obtaining, or withholding be from the possession of the true owner or of any other person. Care, custody, management, and con-

trol are among the legal definitions of possession. The term "true owner" refers to the person who, at the time of the taking, obtaining, or withholding, had the superior right to possession of the property in the light of all conflicting interests therein which are involved in the particular case. For instance, an estate is the true owner of its property as against a trustee of the estate charged with larceny of such property, and an organization is the true owner of its funds as against the custodian of the funds charged with larceny thereof. By the phrase "any other person" is meant any person (even a person who himself had stolen the property) who is an owner of the property by virtue of his possession or right to possession thereof and who is other than the one who takes, obtains, or withholds the property. With respect to the matter of pleading a violation of this article, the ownership of the property may be alleged to have been in any person other than the accused who, at the time of the theft, was a general owner or a special owner thereof. A general owner of property is a person who has title to it, whether or not he has possession of it; whereas a special owner, such as a borrower or hirer, is one who does not have title but who does have possession, or the right to possession, of the property. The word "person," as used in referring to one from whose possession property has been taken, obtained, or withheld, and to any owner of property, includes (in addition to a natural person) a government, a corporation, an association, an organization, and an estate. Such a person need not be a legal entity.

(4) *Wrongfulness of the taking, obtaining, or withholding.*—The taking, obtaining, or withholding of the property must be wrongful. As a general rule, a taking or withholding of property from the possession of another is wrongful if done without the consent of the other, and an obtaining of property from the possession of another is wrongful if the obtaining is by false pretense. However, such an act is not wrongful if it is authorized by law or apparently lawful superior orders, nor, subject to the following observations as to larceny by an owner, will it result in a violation of Article 121 if done by a person entitled to the possession of the property as against (or equally with) the one from whose possession the property has been taken, obtained, or withheld. An owner of property who takes or withholds it from the possession of another without the consent of the other, or who obtains it from the possession of another by false pretense, does so wrongfully, and may be guilty of larceny, if the other has a superior right to possession of the property, such as a lien, or if the act is done with intent to charge the other with the value of the property.

A person who takes, obtains, or withholds property as the agent of another has the same rights and liabilities as does his principal, but he may not be charged with a guilty knowledge or intent of the principal to which he was not a party.

(5) *False pretense.*—With respect to obtaining property by false pretense, the false pretense may be made by means of any act, word, symbol, or token. The pretense must be in fact false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without an honest belief in its truth. A false pretense is a false representation of past or existing fact. In addition to other kinds of facts, the fact falsely represented by a person may be his power or authority to effect a certain result, his opinion, or his intention. Consequently, one who represents that he presently intends to perform a certain act in the future, but who at the time of his representation does not honestly intend to perform the act, makes a false representation of an existing fact—his intention—and thus a false pretense. For example, a person makes such a false pretense by uttering a check made by him if at the time of the uttering he did not honestly intend to have sufficient funds in the bank available to meet payment of the check upon its presentment for payment in due course.

Although the pretense need not be the sole cause inducing the owner to part with his property, it is necessary that it be an effective (and intentional) cause of the obtaining. A false representation made after the property was obtained, such as giving a check, without intending that it shall be honored, in purported payment of a debt incurred in a past purchase of property and not thereby obtaining any money, personal property, or article of value, will not result in the commission of an offense denounced by Article 121.

A larceny is committed when a person obtains the property of another by false pretense and with intent to steal, even though the owner neither intended nor was requested to part with title to the property. Thus a person who gets possession of the watch of another by pretending that he is going to use it for a short time and then return it, but who really intends to sell it, is guilty of larceny.

(6) *Intent.*—The offense of larceny requires that the taking, obtaining, or withholding by the thief be accompanied by an intent permanently to deprive or defraud another of the use and benefit of property or permanently to appropriate the property to his own use or the use of any person other than the true owner. These intents are collectively called an intent to steal. Although a person has acquired possession of property by a taking or obtaining which was not wrong-

ful, or which was without the concurrence of an intent to steal, he nevertheless can commit a larceny of the property if after the taking or obtaining he forms an intent to steal it and wrongfully withholds it with that intent. For example, if a person obtains the vehicle of another by hiring it and thereafter decides to keep the vehicle permanently, and pursuant to that decision either fails to return it at the appointed time or uses it for a purpose not authorized by the terms of the hiring, he has committed larceny, even though at the time he obtained the vehicle he fully intended to return it after using it according to the agreement of hire. The existence of an intent to steal must, in most cases, he inferred from the circumstances. Thus, if a person secretly takes property, hides it, and denies that he knows anything about it, an intent to steal may well be inferred; but if he takes it openly, and returns it, this would tend to negative such an intent. Proof of a subsequent sale of the property shows an intent to steal, and, therefore, evidence of such a sale may be introduced to support a charge of larceny. An intent to steal is implicit in a wrongful and intentional dealing with the property of another in a manner likely to cause him to suffer a permanent loss thereof. Consequently, a person may be guilty of larceny even though he intends to return the property ultimately, if the execution of that intent depends on a future condition or contingency which is not likely to happen within a reasonably limited and definite period of time. Thus one may be found guilty of larceny who conceals the property of another with intent to retain it until a reward is offered for it, or who pawns the property of another without authority, intending to redeem it at an uncertain future date and then return it.

Although ordinarily the taking, obtaining, or withholding need not be for the benefit of the thief himself, a person who divests another of property intending only to restore it to the possession of the true owner, as when he takes stolen property from a thief with that intent, does not commit larceny or wrongful appropriation. Also, a person who takes, obtains, or withholds the property of another, believing honestly and reasonably, although mistakenly, that he or the person for whom he is acting has a legal right to acquire or retain the property, is not guilty of an offense in violation of Article 121.

An intention to pay for the property stolen or otherwise to replace it with an equivalent is not a defense, even though such an intention existed at the time of the theft, and, once a larceny is committed, a return of the property or payment for it is no defense.

(7) *Miscellaneous.*—A taking or withholding of lost property by the finder is larceny if accompanied by an intent to steal and if a

clue to the identity of the general or special owner, or through which such identity may be traced, is furnished by the character, location, or marking of the property, or by other circumstances.

When a larceny of several articles is committed at substantially the same time and place, it is a single larceny even though the articles belong to different persons. Thus, if a thief steals a suitcase containing the property of several individuals or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification.

Proof.—(*a*) That the accused wrongfully took, obtained, or withheld from the possession of the true owner or of any other person the property described in the specification; (*b*) that such property belonged to a certain person named or described; (*c*) that such property was of the value alleged, or of some value; and (*d*) the facts and circumstances of the case, showing that the taking, obtaining, or withholding by the accused was with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner.

Items of government issue which were serviceable government property at the time they were stolen are deemed to have values equivalent to the prices therefor as listed in official publications or, if not so listed, as otherwise officially recognized. As a general rule, the value of other stolen property is to be determined by its legitimate market value at the time and place of the theft. If such property, because of its character or the place where it was stolen, had no legitimate market value at the time and place of the theft or if that value cannot readily be ascertained, its value may be determined by its legitimate market value in the United States, as of the time of the theft, or by its replacement cost at that time, whichever is the lesser. Market value may be established by proof of the recent purchase price paid for the article upon the legitimate market involved; or by testimony or other admissible evidence emanating from any person who is familiar through training or experience with the market value in question; or by the testimony of a person who has ascertained the price of similar articles by adequate inquiry in the market involved. The owner of the property may testify as to its market value if he is familiar with its quality and condition, the circumstance that he is not otherwise qualified to express an opinion on the question of the market value of the property, if such be the case, going only to the weight to be given to his testimony and not to the admissibility thereof. When the character of the property clearly appears in evidence, as when, for instance, it is exhibited to the court, the court, from its own experience, may infer that it has some value. If as a matter of common knowledge the property is obviously of a value substantially in excess of $50, as in the case of an automobile in good condition or a large collection of precious stones, the court may find a value of more than $50. Writings representing value may be considered to have the value which they represented (even though contingently) at the time of the theft.

If an owner of property (or someone acting in his behalf) steals it from a person who has a superior, but limited, interest in the property, such as a lien, and the theft is committed without intending to charge such person with the value of the property, the value for punishment purposes shall be that of the limited interest.

b. WRONGFUL APPROPRIATION

Discussion.—See generally 200*a*. Article 121 defines the offense of wrongful appropriation in the same way that larceny is defined, except that the wrongful taking, obtaining, or withholding need be with intent to deprive, defraud, or appropriate only temporarily. A charge of wrongful appropriation is necessarily included in a charge of larceny.

Instances of the offense of wrongful appropriation are: Taking the automobile of another without permission or lawful authority, with intent to drive it a short distance and then return it or cause it to be returned to the owner; obtaining a service weapon by falsely pretending to be about to go on guard duty, the weapon being thus obtained with intent to use it on a hunting trip and thereafter effect its return; and, while driving a government vehicle on a mission to deliver supplies, withholding the vehicle from the government service by deviating from the assigned route without authority, with intent to visit a friend in a nearby town and thereafter restore the vehicle to its lawful use.

An inadvertent exercise of control over the property of another will not result in a wrongful appropriation. For example, a person is not guilty of this offense who fails to return a borrowed boat at the time agreed upon because he inadvertently lost his direction and went aground on a sand bar.

Proof.—(*a*) That the accused wrongfully took, obtained, or withheld from the possession of the true owner or of any other person the property described in the specification; (*b*) that such property belonged to a certain person named or described; (*c*) that such property was of the value alleged, or of some value; and (*d*) the facts and circumstances of the case showing that the taking, obtaining, or withholding by the accused was with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner.

201. ARTICLE 122—ROBBERY

Discussion.—Article 122 defines robbery as taking with intent to steal anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or the person or property of a relative or member of his family or of anyone in his company at the time of the robbery.

The particular thing must be taken from the person of another or in his presence, but to be in his presence it is not necessary that he be within any certain distance of his property. If persons enter a house and force the owner by threats to disclose the hiding place of valuables in an adjoining room, and, leaving the owner tied, go into such room and steal the valuables, they have committed robbery.

When a robbery is committed by force or violence, there must be actual force or violence to the person, preceding or accompanying the taking against his will, and it is immaterial that there is no fear engendered in the victim. The amount of force used is immaterial; it is enough to constitute robbery if the force overcomes the actual resistance of the person robbed, or puts him in such a position that he makes no resistance, or suffices to overcome the resistance offered by a chain or other fastening by which the article is attached to the person. If an article is merely snatched from the hand of another or a pocket is picked by stealth and no other force is used, and the owner is not put in fear, the offense is not robbery. But if resistance is overcome in snatching the article, there is sufficient violence, as when the earring of a woman is torn from her ear or a hair ornament entangled in her hair is snatched away. There is sufficient violence when a person's attention is diverted by his being jostled by a confederate of a pickpocket, who is thus enabled to steal the person's watch, even though the person had no knowledge of the act; or when a man is knocked insensible and his pockets rifled; or when an officer steals property from the person of a prisoner in his charge after handcuffing him on the pretext of preventing his escape.

When a robbery is committed by putting the victim in fear, there need be no actual force or violence, but there must be demonstrations of force or menaces by which the victim is placed in such fear that he is warranted in making no resistance. The fear must be a reasonably well-founded apprehension of present or future injury, and the

The provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man, and the act of killing must be committed under and because of the passion. The provocation must not be sought or induced as an excuse for killing or doing harm. If, judged by the standard of a reasonable man, sufficient cooling time elapses between the provocation and the killing, it is murder, even if the passion of the particular accused persists.

Instances of adequate provocation are: Assault and battery inflicting great or grievous bodily harm, an unlawful imprisonment, and the sight by a husband or wife of an act of adultery committed by his or her spouse. If the person so assaulted or imprisoned, or the husband or wife so situated, at once kills the offender or offenders in the heat of sudden passion caused by their act, voluntary manslaughter only has been committed. Insulting or abusive words or gestures, a slight blow with the hand or fist, and trespass or other injury to property are not, standing alone, considered adequate provocation.

Among the offenses which may be included in a particular charge of voluntary manslaughter are involuntary manslaughter, negligent homicide in violation of Article 134, assault with intent to commit voluntary manslaughter, aggravated assault, assault and battery, and assault.

b. INVOLUNTARY MANSLAUGHTER

Discussion.—Involuntary manslaughter is an unlawful homicide (see 197*a*) committed without an intent to kill or inflict great bodily harm; it is an unlawful killing by culpable negligence, or while perpetrating or attempting to perpetrate an offense other than burglary, sodomy, rape, robbery, or aggravated arson, directly affecting the person.

Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of such act or omission. Thus the basis of a charge of involuntary manslaughter may be a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not, necessarily, be a natural and probable consequence of such act or omission.

Instances of culpable negligence are: Negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous; carelessly leaving poisons or dangerous drugs where they may endanger life.

When there is no legal duty to act there can, of course, be no neglect. Thus when a stranger makes no effort to save a drowning man, or a person allows a mendicant to freeze or starve to death, no crime is committed.

By an offense directly affecting the person is meant one affecting some particular person as distinguished from an offense affecting society in general. Among offenses directly affecting the person are the various types of assault, battery, false imprisonment, voluntary engagement in an affray, the use of more force than is reasonably necessary in the suppression of a mutiny or riot, and maiming.

Among the offenses which may be included within a particular charge of involuntary manslaughter are negligent homicide in violation of Article 134, assault and battery, and assault.

Proof.—(*a*) That the victim named or described is dead; (*b*) that his death resulted from the act or omission of the accused, as alleged; and (*c*) facts and circumstances showing that the homicide amounted in law to the degree of manslaughter alleged.

199. ARTICLE 120—RAPE AND CARNAL KNOWLEDGE

a. RAPE

Discussion.—This article defines rape as the commission of an act of sexual intercourse by a person with a female not his wife, by force and without her consent. It may be committed on a female of any age. Force and want of consent are indispensable to the offense, but the force involved in the act of penetration will suffice if there is no consent. Any penetration, however slight, is sufficient to complete the offense (Art. 120*c*).

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and if a woman fails to take such measures to frustrate the execution of a man's design as she is able to take and are called for by the circumstances, the inference may be drawn that she did in fact consent. All the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm.

It has been said of this offense, "It is true that rape is a most detestable crime . . .; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent."

If there be actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the woman is of unsound mind or unconscious to an extent rendering her incapable of giving consent, the act is rape. Likewise, the acquiescence of a female child

As regards the intent to defraud, it need not be directed toward anyone in particular nor be for the advantage of the offender. It is immaterial whether anyone is actually defrauded, or that no further step be made toward carrying out the intent to defraud than the false making or altering of a writing.

Proof.—(*a*) That a certain signature or writing was falsely made or altered, as alleged; (*b*) that the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; (*c*) that it was the accused who so falsely made or altered such signature or writing; or uttered, offered, issued, or transferred it, knowing it to have been so made or altered; and (*d*) facts and circumstances showing the intent of the accused thereby to defraud.

In proving forgery, the instrument itself should be produced, if available. That the signature to a written instrument was falsely made may be proved by the testimony of the person whose signature was forged, showing that he had not signed the document himself, and that he had not authorized the accused to do so for him. If the name of a fictitious person is used as, for example, the purported drawer of a check, evidence of falsity may include evidence that the purported drawer of the check has no account in the bank upon which the check was drawn.

203. ARTICLE 124—MAIMING

Discussion.—Maiming is defined in Article 124 as inflicting upon the person of another, with intent to injure, disfigure, or disable, an injury which seriously disfigures his person by any mutilation thereof, or destroys or disables any member or organ of his body, or seriously diminishes his physical vigor by the injury of any member or organ. For example, it is maiming to put out a man's eye, to cut off his hand, foot, or finger, or to knock out his front teeth, as these injuries destroy or disable those members or organs; likewise, it is maiming to cut off an ear or to scar a face with acid, as these injuries seriously disfigure the person; it is also maiming to injure an internal organ so as to seriously diminish the physical vigor of a person.

A disfigurement need not mutilate any entire member to come within the article, nor be of any particular type, but must be such as to impair perceptibly and materially the victim's comeliness. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury, one of a substantially permanent nature. The offense is complete if such an injury is inflicted, however, even though there is a possibility that the victim may eventually recover the use of the member or organ, or that the disfigurement may be cured by surgery.

The means of inflicting the injury are immaterial to proof of the offense although they may be important as bearing upon the question of intent. Infliction of the type of injuries specified in this article upon the person of another is presumptive evidence of an intent to injure, disfigure, or disable such other. If the injury be done under circumstances which would justify or excuse homicide the offense is not committed (197*b*, *c*).

Among the offenses which may be included in a particular charge of maiming are aggravated assault, assault and battery, and assault.

Proof.—(*a*) That the accused inflicted upon a certain person the injury alleged; (*b*) that the injury seriously disfigured his person, or destroyed or disabled an organ or member, or seriously diminished his physical vigor by the injury to an organ or member; (*c*) facts and circumstances showing that the accused had an intent to injure, disfigure, or disable the person.

204. ARTICLE 125—SODOMY

Discussion.—This article defines sodomy as engaging in unnatural carnal copulation, either with another person of the same or opposite sex, or with an animal. Any penetration, however slight, is sufficient to complete the offense and emission is not necessary.

It is unnatural carnal copulation for a person to take into his or her mouth or anus the sexual organ of another person or of an animal; or to place his or her sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation in any opening of the body of an animal.

Proof.—That the accused engaged in unnatural carnal copulation with a certain other person or with an animal, as alleged.

205. ARTICLE 126—ARSON

a. AGGRAVATED ARSON

Discussion.—Aggravated arson is defined by this article as the willful and malicious burning or setting on fire of an inhabited dwelling, or of any other structure, movable or immovable, wherein to the knowledge of the offender there is at the time a human being.

In aggravated arson, danger to human life is the essential element; in simple arson, it is injury to the property of another. In either case, it is immaterial that no one is, in fact, injured. A person may be guilty of aggravated arson even against his own dwelling, whether as owner or tenant. It must be shown that the accused set the fire willfully and maliciously, that is, not merely by negligence or accident.

An inhabited dwelling includes the outbuildings that form part of the cluster of buildings used as a residence. A shop or store is not an inhabited dwelling unless occupied as such, nor is a house that has never been occupied or which has been temporarily abandoned. The actual presence of a human being in an inhabited dwelling at the time of burning is not, however, necessary to constitute the offense of aggravated arson.

Aggravated arson may also be committed by burning or setting on fire any other structure, movable or immovable, such as a theater, church, boat, trailer, tent, auditorium, or any other sort of shelter or edifice, whether public or private, wherein to the knowledge of the offender there is at the time a human being. It may be inferred that the offender had such knowledge when the nature of the structure, as a department store or theater during hours of business, or other circumstances, are shown to have been such that a reasonable man must have known of the presence of human beings therein at the time.

It is not necessary that the dwelling or structure be consumed or materially injured; it is enough if fire is actually communicated to any part thereof. Any actual burning or charring is sufficient, but a mere scorching or discoloration by heat is not.

For the offense of aggravated arson, the value and ownership of the dwelling or other structure are immaterial, but should ordinarily be alleged and proved to permit the finding, in an appropriate case, of the lesser included offense of simple arson.

Proof.—(*a*) That the accused burned or set on fire the inhabited dwelling, or other structure, as alleged; (*b*) that such dwelling or structure was of a value and belonged to a certain person, as alleged; (*c*) facts and circumstances showing that the act was willful and malicious; and if not an inhabited dwelling, (*d*) facts and circumstances showing that the accused had knowledge there was a human being in the structure at the time.

b. SIMPLE ARSON.

Discussion.—Simple arson is defined as the willful and malicious burning or setting fire to the property of another under circumstances not amounting to aggravated arson.

The offense includes burning or setting fire to real or personal property of someone other than the offender and, as in aggravated arson, it must be shown that the accused set the fire willfully and maliciously.

Proof.—(*a*) That the accused burned or set fire to certain property of another, and the value of the property, as alleged; and (*b*) facts and circumstances showing that the act was willful and malicious.

206. ARTICLE 127—EXTORTION

Discussion.—Article 127 defines extortion as the communication of threats to another with the intention thereby to obtain anything of value, or any acquittance, advantage, or immunity of any description. The offense is complete upon communication of the threat with the requisite intent, and evidence of the actual or probable success or failure of the extortion is immaterial to the determination of guilt.

A threat may be communicated by word of mouth or in a writing, the essential element of the offense being the knowledge of the victim. An acquittance is, in general terms, a release or discharge from an obligation. An intent to obtain any advantage or immunity of any description may include an intent to make a person do an act against his will.

The threat sufficient to constitute extortion may be a threat to do any unlawful injury to the person or property of the individual threatened or of any member of his family or of any other person held dear to him; or a threat to accuse the individual threatened or any member of his family or any other person held dear to him, of any crime; or a threat to expose or impute any deformity or disgrace to the individual threatened or to any member of his family or to any other person held dear to him; or a threat to expose any secret affecting the individual threatened or any member of his family or any other person held dear to him; or a threat to do any other harm.

Proof.—(*a*) That the accused communicated certain threats to another, as alleged; and (*b*) facts and circumstances showing his intent unlawfully to obtain anything of value, or any acquittance, advantage, or immunity of any description, as alleged.

207. ARTICLE 128—ASSAULT

a. ASSAULT

Discussion.—Article 128*a* defines an assault as an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated. An offer to do bodily harm to another, as distinguished from an attempt to do such harm, is a putting of the other in reasonable fear that force will at once be applied to his person. Pointing an unloaded pistol which the assailant knows to be unloaded at another is not an attempt to do bodily harm with the pistol, for the assailant is cognizant of his inability to shoot the victim; yet such an act may be an assault if the victim is aware of the attack and is put in reasonable fear of bodily injury. On the other hand, pointing a loaded pistol with intent to shoot it at one whose back is turned and who is unaware of the impending application of violence to his person, although not a putting in fear, may nevertheless be an assault in the form of an attempt to do bodily harm.

Some other examples of acts which may constitute an assault are raising a stick over another's head as if to strike him and causing him to fear that he will be struck, striking at another with a cane or fist, assuming a threatening attitude and hurrying toward another whereby such other is put in fear of bodily harm, and drawing a pistol from a holster or pocket with an actual or apparent (to the person assailed) intent to use it. Preparation not amounting to an overt act, such as picking up a stone without any attempt or offer to throw it, does not constitute an assault, nor does the mere use of threatening words.

If the circumstances known to the person menaced clearly negative an intent to do bodily harm there is no assault. Thus, if a person accompanies an apparent attempt to strike another by an unequivocal announcement in some form of his intention not to strike, there is no assault. This principle was applied in a case in which the accused raised his whip and shook it at the complainant within striking distance saying, "If you weren't an old man, I would knock you down." However, an offer to inflict bodily injury upon another instantly if the other does not comply with a demand which the assailant has no lawful right to make is an assault. Thus, if A points a pistol at B and says to B, "If you don't hand over your watch I will shoot you," A has committed an assault upon B.

An assault may consist of a culpably negligent act or omission which foreseeably might and does cause another reasonably to fear that force will at once be applied to his person. See 198*b* (Involuntary manslaughter), for a discussion of culpable negligence.

It is not a defense to a charge of assault that for some reason unknown to the assailant his attempt was bound to fail. Thus, if a person loads his rifle with what he believes to be a good cartridge and, pointing it at another, pulls the trigger, he may be guilty of assault although the cartridge was in fact so defective that it did not explode. The same principle was applied to a case in which a person in a house shot through the roof at the place where he supposed a policeman was concealed, although the policeman was at another place on the roof.

If there is a demonstration of violence coupled with an apparent ability to inflict bodily injury, so as to cause the person at whom it was directed reasonably to fear such injury unless he retreats to secure his safety, and under such circumstances he is compelled to retreat to avoid any impending danger, the assault is complete, even though the assailant may never have been within actual striking distance of the person assailed. There must, however, be an apparent present ability to inflict the injury. To aim a pistol at a man at such a distance that it clearly could not injure would not be an assault.

An assault in which the attempt or offer to do bodily harm is consummated by the infliction of such harm is called a battery. A battery may be defined as an unlawful, and intentional or culpably negligent, application of force to the person of another by a material agency used directly or indirectly. It may be a battery to spit on another, to push a third person against him, to set a dog at him which bites him, to cut his clothes while he is wearing them though without touching or intending to touch his person, to shoot him, to cause him to take poison, or to run an automobile against him. A man who fondles against her will a woman not his wife commits a battery, and so does a person who, being excused in using force, uses more force than is required. Sending a missile into a crowd may be a battery on anyone whom the missile hits. If the injury is inflicted unintentionally and without culpable negligence, the offense is not committed. It is not a battery to lay hands on another to attract his attention or to seize another to prevent a fall.

The force applied in a battery may have been directly or indirectly set in motion. Thus a battery can be committed by inflicting bodily injury on a person through striking the horse on which he is mounted or the vehicle in which he is present, as well as by striking him directly.

Proof of a battery will support a conviction of assault, for an assault is necessarily included in a battery.

In order to constitute an assault the act of violence must be unlawful. It must be done without legal justification or excuse (see 197, Murder) and without the lawful consent of the person affected. With respect to the excuse of self-defense, a person may meet force with a like degree of force, except that he may use force likely to result in grievous bodily harm only when retreat is not reasonably possible or would apparently endanger his safety, or when he is in his own home or at a place of duty where he is required to remain.

Proof.—(*a*) That the accused attempted or offered with unlawful force or violence to do bodily harm to a certain person, as alleged, or (*b*), in the case of a consummated assault, that with unlawful force or violence he did bodily harm to such person.

b. AGGRAVATED ASSAULT

Discussion.—Article 128*b* defines two kinds of aggravated assault. One is an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm. The other is an assault, with or without a weapon, in which the assailant intentionally inflicts grievous bodily harm.

See 213*d* (Various types of offenses under Article 134) as to assaults with intent to commit certain offenses of a civil nature and indecent assaults.

(1) *Assault with a dangerous weapon.*—A weapon is dangerous when used in such a manner that it is likely to produce death or grievous bodily harm. By "grievous bodily harm" is meant serious bodily injury. When the natural and probable consequence of a particular use of any means or force would be death or grievous bodily harm, it may be said that the means or force is "likely" to produce that result. The use to which a certain kind of instrument is ordinarily put is of no importance with respect to the question of its method of employment in a particular case. Thus it has been held that a bottle, a beer glass, a rock, a sugar bowl, a piece of pipe, a piece of wood, boiling water, drugs, or a rifle butt may be used in a manner likely to inflict death or grievous bodily harm. On the other hand, it has been held that an unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means or force likely to produce grievous bodily harm, and this would be so whether or not the assailant knew it was unloaded.

With respect to the offense of aggravated assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm, it is not necessary that death or grievous bodily harm be actually inflicted.

(2) *Assault in which grievous bodily harm is intentionally inflicted.*—"Grievous bodily harm" does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs and other serious bodily injuries.

When grievous bodily harm has been inflicted by means of intentionally using force in a manner likely to achieve that result, it may be inferred that grievous bodily harm was intended. For example, intentionally knocking a person from a height, such as a grandstand, so that the resulting fall breaks his leg, is an aggravated assault. On the other hand, striking a person with a fist in a sidewalk fight, and thereby causing him to fall in such a fashion that his head happens to hit the curbstone and his skull is fractured, is not an aggravated asault if no serious injury was inflicted by the blow itself, for, although the fractured skull was a foreseeable consequence of the blow with the fist so that had the victim died as a result of the fracture the offense might have been involuntary manslaughter, that injury nevertheless was not a likely, that is, a natural and probable, consequence of the assailant's act.

It is possible to commit this kind of aggravated assault with the fists, as when, for instance, the victim is held by one of several assailants while the others beat him with their fists and break his nose or jaw.

Proof.*—Assault with a dangerous weapon.*—(*a*) That the accused assaulted (see proof of assault) a certain person with a certain weapon, means, or force; and (*b*) the facts and circumstances of the case showing that such weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

Assault in which grievous bodily harm is intentionally inflicted.—(*a*) That the accused assaulted (see proof of assault) a certain person; (*b*) that grievous bodily harm was thereby inflicted upon such person; and (*c*) the facts and circumstances of the case showing that such bodily harm was intentionally inflicted.

208. ARTICLE 129—BURGLARY

Discussion.—Article 129 defines burglary as breaking and entering in the nighttime the dwelling house of another, with intent to commit an offense punishable under Articles 118 through 128, inclusive. These offenses are murder, manslaughter, rape and carnal knowledge, larceny and wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, and assault.

It is immaterial whether the offense intended is committed or even attempted. If the offense is actually intended it is no defense that its commission was impossible.

To constitute burglary the house must be the dwelling house of another—the term "dwelling house" including outhouses within the common inclosure, farmyard, or cluster of buildings used as a residence.

A store is not a subject of burglary unless part of, or also used as, a dwelling house, as when the occupant uses another part of the same building as his dwelling, or when the store is habitually slept in by his servants or members of his family.

The house must be in the status of being occupied at the time of the breaking and entering. It is not necessary to this status that anyone actually be in it; but if the house has never been occupied at all or has been left without any intention of returning to it this status does not exist. Separate dwellings within the same building, as a flat in an apartment house or a room in a hotel, are subjects of burglary by other tenants or guests, and in general by the owner of the building himself. A tent is not a subject of burglary.

There must be a breaking, actual or constructive. Merely to enter through a hole left in the wall or roof or through an open window or door, even if left only slightly open and pushed farther open by the person entering, will not constitute a breaking; but if there is any removal of any part of the house designed to prevent entry, other than the moving of a partly open door or window, it is sufficient. Opening a closed door or window or other similar fixture, or cutting out the glass of a window or the netting of a screen is a sufficient breaking. The breaking of an inner door by one who has entered the house without breaking, or by a servant lawfully within the house, but who has no authority to enter the particular room, is a sufficient breaking, but unless such a breaking is followed by an entry into the particular room with the requisite intent burglary is not committed.

There is a constructive breaking when the entry is gained by a trick, such as concealing oneself in a box; or under false pretense, such as impersonating a gas or telephone inspector; or by intimidating the inmates through violence or threats into opening the door; or through collusion with a confederate, an inmate of the house; or by descending a chimney, even if only a partial descent is made and no room is entered.

An entry must be effected before the offense is complete, but the entry of any part of the body, even a finger, is sufficient; and an insertion into the house of an instrument, except merely to facilitate further entrance, is a sufficient entry.

Both the breaking and entry must be in the nighttime, which is the period between sunset and sunrise, when there is not sufficient daylight to discern a man's face, and both must be done with the intent to commit in the house an offense punishable under Articles 118 through 128, inclusive. If the available evidence appears to warrant such action, the actual commission of the offense alleged in the burglary specification to have been intended should be charged in a separate specification.

Proof.—(*a*) That the accused broke and entered a certain dwelling house of a certain other person, as specified; (*b*) that such breaking and entering were done in the nighttime; and (*c*) facts and circumstances (for instance, the actual commission of the offense) which show that such breaking and entering were done with the intent to commit the alleged offense therein.

209. ARTICLE 130—HOUSEBREAKING

Discussion.—Article 130 defines housebreaking as unlawfully entering the building or structure of another with intent to commit a criminal offense therein. The offense is broader than burglary in that the place entered is not required to be a dwelling house; it is not necessary that the place be occupied; it is not essential that there be a breaking; the entry may be either in the night or in the daytime; and the intent need not be to commit one of the offenses made punishable under Articles 118 through 128. The intent to commit some criminal offense is an essential element of housebreaking and must be alleged and proved in order to support a conviction of this offense. Any act or omission which is punishable by courts-martial, except an act or omission constituting a purely military offense, is a "criminal offense."

The word "building" includes a room, shop, store, office, or apartment in a building. As used in this article, the word "structure" refers only to those structures which are in the nature of a building or dwelling. Examples of such structures are a stateroom, hold or other compartment of a vessel, an inhabitable trailer, an inclosed goods truck or freight car, a tent, and a houseboat. It is not necessary that the building or structure be in use at the time of the entry. As to what constitutes an entry, see 208 (Burglary).

The principles of the last sentence of the discussion in 208 (Burglary) should be observed when charging housebreaking.

Proof.—(*a*) That the accused unlawfully entered a certain building or structure of a certain other person as specified; and (*b*) the facts and circumstances showing an intent to commit a criminal offense therein, as alleged.

210. ARTICLE 131—PERJURY

Discussion.—Article 131 defines perjury as willfully and corruptly giving, in a judicial proceeding or course of justice and upon a lawful oath or in any form allowed by law to be substituted for an oath, any false testimony material to the issue or matter of inquiry. "Judicial proceeding" includes a trial by court-martial and "course of justice" includes an investigation conducted under Article 32.

The false testimony must be willfully and corruptly given; that is, it must appear that the accused did not believe it to be true. A witness may commit perjury by testifying that he knows a thing to be true when in fact he either knows nothing about it at all or is not sure about it, and this is so whether the thing is true or false in fact. A witness may also commit perjury in testifying falsely as to his belief, remembrance, or impression, or as to his judgment or opinion. Thus, if a witness swears that he does not remember certain matters when in fact he does, or testifies that in his opinion a certain person was drunk when in fact he entertains the contrary opinion, he commits perjury if the other elements of the offense are present.

The oath must be one required or authorized by law and must be duly administered by one authorized to administer it. When a form of oath has been prescribed a literal following of such form is not essential, it being sufficient if the oath administered conforms in substance to the prescribed form. An oath includes an affirmation when the latter is authorized in lieu of an oath.

It is no defense that the witness voluntarily appeared, or that he was incompetent as a witness or that his testimony was given in response to questions that he could have declined to answer, even if he was forced to answer over his claim of privilege.

The false testimony must be with respect to a material matter, but that matter need not be the main issue in the case. Thus perjury may be committed by giving false testimony with respect to the credibility of a material witness, or in an affidavit in support of a request for a continuance, as well as by giving false testimony with respect to a fact from which a legitimate inference may be drawn as to the existence or nonexistence of a fact in issue.

Proof.—(*a*) That the accused took an oath or its equivalent in a certain judicial proceeding or course of justice, as alleged; (*b*) that the oath was administered to the accused in a matter in which an oath was required or authorized by law; (*c*) that the oath was administered by a person having authority to do so; (*d*) that upon such oath the accused gave the testimony alleged; (*e*) that such testimony was material; and (*f*) the facts and circumstances showing that the accused did not believe such testimony to be true.

If the accused is charged with having committed perjury before a court-martial, it must be shown that the court-martial was duly appointed and constituted. Ordinarily this may be shown by introducing in evidence pertinent parts of the record of trial of the case in which the perjury was allegedly committed, or by the testimony of a person who was counsel, the law officer, or a member of the court in that case to the effect that the court was so appointed and constituted.

The falsity of the allegedly perjured statement cannot, without corroboration by other testimony or by circumstances tending to prove such falsity, be proved by the testimony of a single witness. However, documentary evidence directly disproving the truth of the statement charged to have been perjured need not be corroborated if the document is an official record shown to have been well known to the accused at the time he took the oath, or if it appears that the documentary evidence was in existence before the statement was made and that such evidence sprang from the accused himself or was in any manner recognized by him as containing the truth. In such a case, it may be inferred that the accused did not believe the allegedly perjured statement to be true.

211. ARTICLE 132—FRAUDS AGAINST THE GOVERNMENT

a. MAKING A FALSE OR FRAUDULENT CLAIM

Discussion.—A claim is a demand for a transfer of ownership of money or property and does not include requisitions for the mere use of property.

Making a claim is a distinct act from presenting it. A claim may be made in one place and presented in another. The article does not relate to claims against an officer of the United States in his private capacity, but to claims against the United States or any officer thereof as such. It is not necessary that the claim be allowed or paid or that it be made by the person to be benefited by the allowance or payment. The claim must be made with knowledge of its fictitious or dishonest character. This does not include claims, however groundless they may be, that are honestly believed by the maker to be valid, nor claims that are merely made negligently or without ordinary prudence. However, if it appears that a false claim was made under circumstances which would cause the false character of the claim to be apparent to an ordinarily prudent man, it may be assumed that the claim was made with knowledge of its falsity. See also the discussion in 211*b*.

As an example, a false claim is made when an officer having a claim respecting property lost in the military service knowingly includes articles that were not in fact lost and submits that claim to his commanding officer for the action of a board, but only so much of the claim as respects the articles not lost is false within the meaning of this article.

Proof.—(*a*) That the accused made a certain claim against the United States, as alleged; (*b*) that the claim was false or fraudulent in the particulars specified; (*c*) that when the accused made the claim he knew that it was false or fraudulent in such particulars; and (*d*) the amount involved, as alleged.

b. PRESENTING FOR APPROVAL OR PAYMENT A FALSE OR FRAUDULENT CLAIM

Discussion.—See *Discussion* in 211*a*.

False and fraudulent claims include not only those containing some material false statement, but also claims which the claimant knows to have been paid or for some other reason knows he is not authorized to present or upon which he knows he has no right to collect.

The claim must be presented, directly or indirectly, to some person having authority to approve or pay it. A false claim may be tacitly presented, as when a person who knows he is not entitled to certain pay accepts it nevertheless, without disclosing his disqualification, even though he may not have made any verbal representation as to his entitlement to the pay. Instances of such an act are: An enlisted person approaching the pay table when his name is called and drawing pay for a period during which he was absent without leave, without disclosing the absence; and an officer cashing a pay check which includes an amount for a dependency allowance, knowing and not informing the proper authorities that there had been a change in his dependency status which resulted in his having no right to the allowance paid.

When an officer knows that a certain duly assigned pay account of his is outstanding and that the assignee can collect on it if he chooses to do so, it is no defense to a charge against the officer of presenting for payment a second account covering the same period as the assigned account that the second account was presented relying on the assignee's statement that he would not present the first. But if the accused has good grounds to believe and actually does believe when he presents the second account that the assigned account had been canceled or surrendered by the assignee, his presentation of the second claim does not constitute this offense. A cancellation or surrender of the first account after the presentation of the second account is no defense to the charge.

Other examples of this offense are presenting to a disbursing officer a false final statement, knowing it to be false, and presenting a voucher claiming rations or rental allowances for dependents known not to exist.

Proof.—(*a*) That the accused presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States, as alleged; (*b*) that such claim was false or fraudulent in the particulars alleged; (*c*) that when the accused presented the claim he knew it was false or fraudulent in such particulars; and (*d*) the amount involved, as alleged.

c. MAKING OR USING A FALSE WRITING OR OTHER PAPER IN CONNECTION WITH CLAIMS

Discussion.—See 211*a* and *b*. The false or fraudulent statement must be material, that is, it must have a tendency to mislead governmental officials in their consideration or investigation of the claim. The offense of making a writing or other paper known to contain a false or fraudulent statement for the purpose of obtaining the approval, allowance, or payment of a claim is complete when the writing or paper is made for that purpose, whether or not any use of the paper has been attempted and whether or not the claim has been presented.

Proof.—(*a*) That the accused made or used a certain writing or other paper, as alleged; (*b*) that certain material statements in such writing or other paper were false or fraudulent, as alleged; (*c*) that the accused knew the statements were false or fraudulent; (*d*) facts and circumstances showing that the act of the accused was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States, as specified; and (*e*) the amount involved, as alleged.

d. FALSE OATH IN CONNECTION WITH CLAIMS

Discussion.—See 211*a* and *b*.

Proof.—(*a*) That the accused made an oath to a certain fact or to a certain writing or other paper, as alleged; (*b*) that the oath was false, as alleged; (*c*) that the accused knew it was false; and (*d*) facts and circumstances showing that the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States, as alleged.

e. FORGERY OF SIGNATURE IN CONNECTION WITH CLAIMS

Discussion.—See 211*a* and *b*. See also 202 (Forgery). Any fraudulent making of the signature of another, whether or not an attempt is made to imitate the handwriting, is forging or counterfeiting.

Proof.—(*a*) That the accused forged or counterfeited the signature of a certain person on a certain writing or other paper as specified; or that he used the forged or counterfeited signature of a certain person, knowing such signature to be forged or counterfeited, as alleged; and (*b*) facts and circumstances showing that his act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States, as alleged.

f. DELIVERING LESS THAN AMOUNT CALLED FOR BY RECEIPT

Discussion.—With respect to this offense it is immaterial by what means, whether deceit, collusion, or otherwise, the accused effected the transaction, or what his purpose was in so doing.

The giving by a disbursing officer of the full amount called for by a receipt but in excess of the amount properly due, then receiving back the excess over the amount due; and the insertion by a disbursing officer upon a receipt signed in blank of the amount properly due, after paying to the creditor a less amount, are examples of this offense.

Proof.—(*a*) That the accused had charge, possession, custody, or control of certain money or property of the United States furnished or intended for the armed forces thereof, as alleged; (*b*) that he obtained a receipt for a certain amount or quantity of that money or property, as alleged; (*c*) that for the receipt he knowingly delivered to a certain person having authority to receive it an amount or quantity of the money or property less than the amount or quantity thereof specified in the receipt; and (*d*) the value of the undelivered money or property, as alleged.

g. MAKING OR DELIVERING RECEIPT WITHOUT HAVING FULL KNOWLEDGE THAT IT IS TRUE

Discussion.—When, for instance, an officer or other person subject to military law is authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, and a receipt or other paper is presented to him for signature stating that a certain amount of supplies has been furnished by a certain contractor, it is his duty before signing the paper to know that the full amount of supplies therein stated to have been furnished has in fact been furnished, and that the statements contained in the paper are true. If, with intent to defraud the United States, he signs the paper without that knowledge, he is guilty of a violation of this section of the article; and signing the paper without such knowledge is prima facie evidence of the intent to defraud.

Proof.—(*a*) That the accused was authorized to make or deliver a certificate of the receipt from a certain person of certain property of the United States furnished or intended for the armed forces thereof, as alleged; (*b*) that he made or delivered to that person a certificate of receipt, as alleged; (*c*) that the certificate was made or delivered without the accused having full knowledge of the truth of a certain material statement or statements therein; (*d*) facts and circumstances showing that his act was done with intent to defraud the United States; and (*e*) the amount involved, as alleged.

212. ARTICLE 133—CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN

Discussion.—The conduct contemplated may be that of an officer of either sex or of a cadet or midshipman. When applied to a female officer the term "gentleman" is the equivalent of "gentlewoman."

Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously compromises his standing as an officer.

There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, of indecency or indecorum, or of lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet ideal moral standards, but there is a limit of tolerance below which the individual standards of an officer, cadet, or midshipman cannot fall without seriously compromising his standing as an officer, cadet, or midshipman or his character as a gentleman. This article contemplates conduct by an officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising.

This article includes acts made punishable by any other article, provided such acts amount to conduct unbecoming an officer and a gentleman; thus an officer who steals property violates both this and Article 121.

Instances of violation of this article are: Knowingly making a false official statement; dishonorable failure to pay debts; opening and reading the letters of another without authority; using insulting or defamatory language to another officer in his presence or about him to other military persons; being grossly drunk and conspicuously disorderly in a public place; public association with notorious prostitutes; committing or attempting to commit a crime involving moral turpitude; failing without a good cause to support his family.

Proof.—(*a*) That the accused did or omitted to do the acts, as alleged; and (*b*) the circumstances as specified.

213. ARTICLE 134—GENERAL ARTICLE

a. DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE IN THE ARMED FORCES

Discussion.—The disorders and neglects punishable under Article 134 include those acts or omissions to the prejudice of good order and discipline not specifically mentioned in other articles.

"To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. An irregular or improper act on the part of a member of the military service can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing discipline, but the article does not contemplate such distant effects and is confined to cases in which the prejudice is reasonably direct and palpable.

Instances of such disorders and neglects in the case of an officer are: Rendering himself unfit for duty by excessive use of intoxicants or drugs; drunkenness; and allowing a member of his command to go on duty knowing him to be drunk.

Instances of such disorders and neglects in the case of enlisted persons are: Appearing in improper uniform; wrongfully abusive use of military vehicles; careless discharge of firearms; and impersonating an officer.

A *breach of a custom of the service* may result in a violation of this Article. In its legal sense the word "custom" imports something more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common consent have attained the force of law in the military or other community affected by them. There can be no such thing as a custom that is contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been long abandoned. Many customs of the service are now set forth in regulations of the various armed forces. Violations of these customs should be charged under Article 92 as violations of the regulations in which they appear.

It is a violation of this article *wrongfully to possess marihuana or a habit forming narcotic drug.* Possession of marihuana or of a habit forming narcotic drug is presumed to be wrongful unless the contrary appears. A person's possession of a drug is innocent when the drug has been duly prescribed for him by a physician and the prescription has not been obtained by fraud, or when his possession is the result of accident or mistake, or when he possesses it in the performance of his duty.

Proof.—(*a*) That the accused did or failed to do the acts, as alleged; and (*b*) the circumstances as specified.

b. CONDUCT OF A NATURE TO BRING DISCREDIT UPON THE ARMED FORCES

Discussion.—"Discredit" as here used means "to injure the reputation of." Examples of this conduct on the part of persons subject to military law may include acts in violation of local law of a nature to bring discredit upon the armed forces. So also any discreditable conduct not elsewhere made punishable by any specific article or by one of the other clauses of Article 134 is punishable under this clause.

If an officer or enlisted person by his conduct in incurring private indebtedness, or by his attitude toward it or his creditor thereafter, reflects discredit upon the service to which he belongs, he may be brought to trial for his misconduct. He should not be brought to trial unless in the opinion of the military authorities the facts and law are undisputed and there appears to be no legal or equitable counterclaim or set-off that may be urged by him. The military authorities will not attempt to discipline officers and enlisted persons for failure to pay disputed private indebtedness or claims, that is, when there appears to be a genuine dispute as to the facts or the law. An officer may be tried for this offense under either Article 133 or Article 134, as the circumstances may warrant.

Proof.—(*a*) That the accused did or failed to do the acts, as alleged; and (*b*) the circumstances as specified.

c. CRIMES AND OFFENSES NOT CAPITAL

Crimes and offenses not capital which are referred to and made punishable by Article 134 include those acts or omissions, not made punishable by another article, which are denounced as crimes or offenses by enactments of Congress or under authority of Congress and made triable in the Federal civil courts.

State and foreign laws are not included within the crimes and offenses not capital referred to in Article 134 and violations thereof may not be prosecuted as such except insofar as State law becomes Federal law of local application under Title 18 U. S. C. § 13. On the other hand, an act which is a violation of a State law or a foreign law may constitute a disorder or neglect to the prejudice of good order and discipline or conduct of a nature to bring discredit upon the armed forces and so be punishable under the first or second clause of Article 134.

For the purpose of court-martial jurisdiction the Federal laws which may be applied under the clause, "crimes and offenses not capital," are divided into two groups:

(1) *Crimes and offenses of unlimited application.*—Certain crimes and offenses denounced by Title 18 U. S. C., such as counterfeiting (18 U. S. C. 471), various frauds against the Government not denounced by Article 132, and other offenses which are directly injurious to the Government and are made punishable wherever committed are made applicable under the third clause of Article 134 to all persons subject to military law regardless of where the wrongful act or omission occurred.

(2) *Crimes and offenses of local application.*—Crimes and offenses which are listed in Title 18 U. S. C. but which are limited in their applicability to the special maritime and territorial jurisdiction of the United States as defined in Title 18 U. S. C. § 7, those applicable within the continental United States, and those included in the law of the District of Columbia, in the laws of the Territories or possessions of the United States, and in the laws applicable in reservations or places over which the United States has exclusive jurisdiction or concurrent jurisdiction with a State, which are not specifically included in some article, are made applicable under

Article 134 to all persons subject to military law who commit such crimes or offenses within the geographical boundaries of the areas in which they are applicable. For the law of a reservation or place over which the United States has exclusive jurisdiction or concurrent jurisdiction with a State, see Title 18 U. S. C. § 13. For example, a person subject to military law cannot be prosecuted under the third clause of Article 134 for having committed a crime or offense, not capital, when the act occurred in occupied foreign territory, merely because that act would have been an offense against the law of the District of Columbia if it had been committed there. Such an act might, however, regardless of where committed, in a proper case be prosecuted under the first or second clause of Article 134 as a disorder or neglect to the prejudice of good order and discipline or as an offense of a nature to bring discredit upon the armed forces.

d. VARIOUS TYPES OF OFFENSES UNDER ARTICLE 134

(1) *ASSAULTS INVOLVING INTENT TO COMMIT CERTAIN OFFENSES OF A CIVIL NATURE*

Discussion.—See 207 (Assault). The assaults here designated as being punishable under Article 134 are those perpetrated with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking. An assault with intent to commit an offense is not necessarily the equivalent of an attempt to commit the intended offense, for an assault can be committed in furtherance of an intended act without thereby achieving that degree of proximity to consummation of the act which is essential to an attempt to commit that act (see 159, Attempts).

Some of these assaults will be discussed below.

(*a*) *Assault with intent to murder.*—This is an assault aggravated by the concurrence of an intent to murder, that is, an intent to commit an act which, should death ensue, would be murder. To constitute an assault with intent to murder with a firearm, it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. Thus, if a man with intent to murder another deliberately assaults him by shooting at him, the fact that he misses does not alter the character of the offense. When the intent to murder exists, the fact that for some unknown reason the actual consummation of the murder by the means employed is impossible does not disprove guilt of an assault with intent to commit murder if the means are apparently adapted to the end in view. Thus, if a person intending to murder another loads his rifle with what he believes to be a ball cartridge and aims and discharges his rifle at the other, it is no defense that he, by accident, used a blank cartridge.

The intent to murder need not be directed against the person assaulted if the assault is committed with intent to murder some person. If the accused, intending to murder A, shoots at B, mistaking him for A, he is guilty of assaulting B with intent to murder him. Also, if a man fires into a group with intent to murder someone, he is guilty of an assault with intent to murder each member of the group.

(*b*) *Assault with intent to commit voluntary manslaughter.*—This is an assault committed with intent to do an act which, if death resulted therefrom, would be voluntary manslaughter. There can be no assault with intent to commit involuntary manslaughter, for involuntary manslaughter is not a crime capable of being intentionally committed.

(*c*) *Assault with intent to commit rape.*—This is an assault accompanied by an intent to have unlawful sexual intercourse with a woman by force and without her consent. The accused must have intended to overcome any resistance by force, actual or constructive, and to penetrate the woman's person. Any less intent will not suffice. Indecent advances and importunities, however earnest, not accompanied by such an intent, do not constitute this offense, nor do mere preparations to rape not amounting to an assault. Thus, if a man, intending to rape a woman, conceals himself in her room to await a favorable opportunity to execute his design, but before the opportunity arises is discovered and flees, he is not guilty of an assault with intent to commit rape.

No actual touching is necessary. If a man enters a woman's room and gets in the bed where she is for the purpose of raping her, he commits the offense under discussion although he does not touch the woman.

Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted.

Lesser offenses that may be included in a charge of assault with intent to rape are indecent assault and assault.

(*d*) *Assault with intent to rob.*—This is an assault with the concurrent intent to steal property by taking it from the person or in the presence of another, against his will, by means of force or violence or putting him in fear. The fact that the accused intended to take only money and that the person he intended to rob had none is not a defense.

(*e*) *Assault with intent to commit sodomy.*—The assault must be against a human being and must be with the intent to commit sodomy. Any less intent, or different intent, will not suffice.

Proof.—(*a*) That the accused assaulted a certain person, as alleged; and (*b*) the facts and circumstances of the case showing the existence at the time of the assault of the intent of the accused to murder, or to commit voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking, as alleged.

(2) *INDECENT ASSAULT*

Discussion.—See 207 (Assault). An indecent assault is the taking by a man of indecent, lewd, or lascivious liberties with the person of a female, without her consent and against her will, with intent to gratify his lust or sexual desires. In a proper case indecent assault may be a lesser included offense of assault with intent to commit rape.

Proof.—(*a*) That the accused assaulted a certain female by taking indecent, lewd, or lascivious liberties with her person; and (*b*) facts and circumstances showing that the acts were done with intent to gratify the lust or sexual desires of the accused.

(3) *INDECENT ACTS WITH A CHILD UNDER THE AGE OF 16 YEARS*

Discussion.—This offense consists of taking any immoral, improper, or indecent liberties with, or the commission of any lewd or lascivious act upon or with the body of, any child of either sex under the age of 16 years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of the person committing the act, or of the child, or of both. Consent by a child to any such act or conduct is not a defense.

Proof.—(*a*) That the accused took certain immoral, improper, or indecent liberties with a certain child, as alleged; or that he performed a certain lewd or lascivious act upon or with the body of a certain child, as alleged; (*b*) that the child was under the age of 16 years, as alleged; and (*c*) facts and circumstances showing that the intent of the accused was to arouse, appeal to, or gratify the lust or passions or sexual desires of the accused or the child or both, as alleged.

(4) *FALSE SWEARING*

Discussion.—False swearing is the making under lawful oath of any statement, oral or written, not believing the statement to be true. It may consist, for example, in giving false testimony in a judicial proceeding or course of justice on other than material matters or in making a false oath to an affidavit. It is not necessary that the proceeding in which the oath is taken should be a judicial proceeding or course of justice. The oath may be taken before any person authorized by law to administer oaths. See Article 136 and chapter XXII as to the authority of certain persons to administer oaths, and see 147*a* as to taking judicial notice of the signatures of persons authorized to administer oaths. An oath includes an affirmation when the latter is authorized in lieu of an oath.

Proof.—(*a*) That the accused took an oath or its equivalent in a proceeding or made an oath or its equivalent to an affidavit; (*b*) that the oath was administered to the accused in a matter in which an oath was required or authorized by law; (*c*) that the oath was administered by a person having authority to do so; (*d*) that upon such oath the accused made or subscribed a certain statement, as alleged; and (*e*) facts and circumstances showing that the accused did not believe such statement to be true.

The principles set forth in the last paragraph of the discussion of proof of perjury in 210 apply also to proof of false swearing.

(5) *DISLOYAL STATEMENTS UNDERMINING DISCIPLINE AND LOYALTY*

Discussion.—Certain disloyal statements by military personnel may lack the necessary elements to constitute an offense under Title 18 U. S. C. §§ 2385, 2387, and 2388, but nevertheless, under the circumstances, be punishable as conduct to the prejudice of good order and discipline or conduct reflecting discredit upon the armed forces. Examples are public utterances designed to promote disloyalty or disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing our form of government.

Proof.—(*a*) That the accused made the disloyal statement, as alleged; and (*b*) facts and circumstances showing the design alleged.

(6) *MISPRISION OF A FELONY*

Discussion.—A person who has knowledge of the actual commission of a felony by another and who conceals and does not as soon as possible make known the same to the civil or military authorities is guilty of misprision of the felony. Any offense of a civil nature punishable under the authority of the code by death or by confinement for a term exceeding one year is a felony. A mere failure or refusal to disclose the felony without some positive act of concealment does not make one guilty of this offense. Making a false entry in an account book for the purpose of concealing a felonious theft committed by another, and intimidating a witness of a felony, are examples of a positive act of concealment.

Proof.—(*a*) That the accused had knowledge of the actual commission of a felony by another; and (*b*) that he concealed and did not as soon as possible make known the same to the civil or military authorities.

Chapter XXIX

HABEAS CORPUS

214. GENERAL.—*a. Nature of writ.*—Habeas corpus is a discretionary writ, extraordinary in nature, issued by a civil court upon proper cause shown to inquire into the legality of any restraint upon the liberty of a person. It is a summary remedy for unlawful restraint of liberty, and cannot be used to perform the functions of a writ of error or an appeal. Mere moral restraint (such as military arrest or parole, for example), as distinguished from confinement, is generally considered insufficient to warrant its issuance. A writ of habeas corpus (if issued by the court, either immediately on the filing of the petition for the writ, which is rare, or pursuant to a hearing on an order to show cause why the writ should not issue) directs the custodian to produce before the issuing court on a certain date the body of the person restrained and to explain the reason for the restraint. The burden is on the petitioner to show that he is illegally restrained. If it appears to the court on the face of the petition that the facts stated therein do not warrant the release of the petitioner from restraint, it will refuse to grant the writ without requiring the presence of the petitioner; or on motion of the respondent in appropriate cases the court may dismiss the petition when filed, as, for example, when the petitioner has failed to exhaust his appellate remedies, when the petitioned court lacks jurisdiction of the parties or the subject matter, or when it appears that the sentencing court had jurisdiction of the parties and the offense charged and acted within its lawful power. After a hearing on a writ issued by the court (either immediately or pursuant to the hearing on the show cause order as stated above), it is either discharged or made permanent. If the court determines that it has jurisdiction to proceed and that the restraint is unlawful, the person is ordered released from such restraint. If the court determines either that it lacks jurisdiction to proceed or that the restraint is lawful the writ is discharged and the petition is dismissed.

b. Exhaustion of remedies.—The appellate review of records of trial provided by part IX of the code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by the code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation as required by the code, are final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in Article 73 and to action by the Secretary of a Department as provided in Article 74, and the authority of the President (Art. 76).

Prior to the exhaustion of the remedies of appellate review and petition for new trial which are available to an accused person, as provided in Articles 67 and 73 and in section 12, act of 5 May 1950 (64 Stat. 147; 50 U. S. C. 740), a resort to habeas corpus to test the legality of restraint imposed pursuant to a sentence of a court-martial is inappropriate and premature.

Although the finality of court-martial proceedings and judgments contemplated by Article 76 prevents a direct review by Federal courts of decisions of courts-martial on the merits, as by writ of error or appeal, Article 76 does not preclude an attack on the jurisdiction of a court-martial collaterally in habeas corpus.

c. ***Scope of inquiry.***—The scope of inquiry in a habeas corpus proceeding is limited to the question of whether the order, sentence (the term of confinement imposed not yet having been served), or process under which the restraint is imposed was within the lawful power of the court or officer issuing it. With respect to the restraint imposed pursuant to a sentence of a court-martial the inquiry, however, may not properly be directed to the preliminary proceedings, such as the failure to follow the requirements of Article 32, nor may the inquiry extend to the sufficiency of the evidence to sustain the conviction or to the competence of the law officer or defense counsel. By habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial. The correction of any errors it may have committed is for the military authorities and the Court of Military Appeals, which are alone authorized to review its decision. In a habeas corpus proceeding, the single inquiry, the test, is jurisdiction—whether the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers in the sentence adjudged. See *Hiatt* v. *Brown*, 339 U. S. 103; *Humphrey* v. *Smith*, 336 U. S. 695; *In re Yamashita*, 327 U. S. 1; *Ex parte Quirin*, 317 U. S. 1; *Collins* v. *McDonald*, 258 U. S. 416; *Carter* v. *McClaughry*, 183 U. S. 365; *Carter* v. *Roberts*, 177 U. S. 496; *Swaim* v. *United States*, 165 U. S. 553; *In re Grimley*, 137 U. S. 147; *Dynes* v. *Hoover*, 61 U. S. (20 How) 65; *McClellan* v. *Humphrey*, 181 F. 2d 757 (CA 3 1950).

215. RETURN TO WRIT OR ORDER ISSUED BY A STATE COURT OR JUDGE.—A State court or judge is without authority to issue a writ of habeas corpus if it appears that the person is confined under the authority, or claim and color of the authority, of the

United States, the principle being that no State can authorize one of its judges or courts to exercise judicial power by habeas corpus or any other process within the jurisdiction of another distinct and independent government. No State judge or court, after being judicially informed that a petitioner is in custody under the authority of the United States, has any right to interfere, or to require him to be brought before the State judge or court. If a person thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release. A deserter apprehended by any civil officer having authority to apprehend offenders under the laws of the United States or of any State, District, Territory, or possession of the United States, is in custody by authority of the United States (see Art. 8).

If a State court or judge issues a writ, order, or other process to inquire into the legality of restraint imposed upon a person held by any of the armed forces, the officer to whom the process is directed will, in accordance with appropriate departmental regulations, report that fact by telegraph, telephone, or other expeditious means direct to the Judge Advocate General of the Department concerned or to the General Counsel of the Treasury Department if the petitioner is a member of the Coast Guard and that armed force is not then operating as a part of the Navy; and by similar means will report that fact to the appropriate commander of the army area, naval district, air command, coast guard district, or other comparable command in which the person held by the military authorities is located. He will also report the facts to the United States attorney for the district and request the latter to represent him.

In the case of a person who has been apprehended under a warrant of attachment (115*d* (3), Warrant of attachment), if not inconsistent with instructions received from the authorities specified in the preceding subparagraph, the officer on whom the writ is served will not produce the body but will make return as indicated in 218 (Forms A and B). In other cases, such as in the case of a person subject to military law, the officer on whom the writ is served will not produce the body but will make a return as indicated in 218 (Forms C and B) if such procedure is not inconsistent with the instructions received from the authorities specified in the preceding subparagraph.

216. WRIT OR ORDER ISSUED BY A FOREIGN COURT OR JUDGE.—A court or judge of a foreign country has no authority to inquire into the legality of restraint upon any person held by United States military authority. Any process in the nature of a writ of habeas corpus issued by any foreign court or judge to any officer acting in his official capacity as an officer of the United States will not be obeyed, but its issuance will be reported to the commander of the United States armed force within whose command the person restrained is located, and to the Judge Advocate General of the appropriate Department.

217. RETURN TO WRIT OR ORDER ISSUED BY A FEDERAL COURT OR JUDGE.—Subject to certain exceptions, United States courts and judges of such courts have the power to issue writs of habeas corpus to inquire into the legality of restraint upon liberty imposed by the authority or by the color of the authority of the United States (28 U. S. C. 2241). The single inquiry in military habeas corpus cases is jurisdiction—whether the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers in the sentence adjudged (214*c*).

Upon the issuance of such a writ, order to show cause, or related process, the officer to whom it is directed will, in accordance with appropriate departmental regulations, report that fact by telegraph, telephone, or other expeditious means of communication, direct to the Judge Advocate General of the Department concerned, or to the General Counsel of the Treasury Department if the petitioner is a member of the Coast Guard and that armed force is not then operating as a part of the Navy; and he will report that fact to the appropriate commander of the army area, naval district, air command, coast guard district, or other comparable command, stating briefly the grounds on which the release of the person is sought. He will also report the facts to the United States attorney for the district and request the latter to represent him.

If consistent with instructions received from the authorities specified in the preceding subparagraph, the officer on whom service has been made will obey the writ or order and make a return setting forth the reasons for the restraint. See 218 (Forms A and C).

With reference to the papers to accompany the return in a case in which Form A applies, see 115*d* (3) (Warrant of attachment). In a case to which Form C applies, the copies of the charges and of the order under which the accused is held in arrest or confinement will be certified by the custodian of the originals and sworn to, before an officer authorized to administer oaths under Article 136, in the following form:

I hereby certify that the foregoing is a full and true copy of the original charges preferred against ____________________, and of the original order for his arrest (confinement); that the same are in the usual form of military charges; and that such charges and order conform to the rules regulating military procedure.

____
(Show appropriate official designation)

Sworn to and subscribed before me this ---------- day of -------------- ------, 19 --.

(Show appropriate official designation of officer administering oath)

The copy of the order convening the court or publishing the sentence will be certified and verified in a similar manner.

In the event the court orders the discharge of the person, the officer making the return, through counsel or otherwise, will note an appeal pending instructions from the Department concerned; he will report expeditiously to the Judge Advocate General (or comparable legal officer) of the appropriate Department the action taken by the court or judge, and forward a copy of the order and opinion of the court or judge as soon as it can be obtained.

218. FORMS.—The following forms are set forth as a guide in the appropriate suggested types of action involved. The return in a particular case should, of course, vary from the form according to the facts. Normally, the preparation and filing of the return or other pleadings are accomplished by the United States attorney for the district, with such participation and assistance from the military authorities as he may desire (see 215 and 217).

FORM A

(Return to writ or order)

(Name of appropriate Federal court)

(Caption)

Return of Respondent to Writ of Habeas Corpus (*Order to Show Cause*)

To the Honorable -------------------- (court or judge):

Comes now the respondent in the above-captioned action, upon whom has been served a writ of habeas corpus (an order to show cause why a writ of habeas corpus should not issue) for the production of --------------------, and (by his attorney) making return to the said writ (order) respectfully shows to the court (judge) that he holds the said -------------------- by authority of the United States pursuant to a warrant of attachment issued under Article 46, Uniform Code of Military Justice, by a trial counsel of a lawfully convened general (special) court-martial (by a summary court-martial) and duly directed to him, the said respondent, for execution; that he is diligently and in good faith engaged in executing said warrant of attachment; and that he respectfully submits the same for the inspection of the court, together with the original subpoena and proof of service of the same, a copy of the order appointing the court-martial sworn to as such, before which the said -------------------- has been subpoenaed to testify, a copy of the charges and specifications in the case, sworn to as such, in which the said -------------------- is a witness, a copy of the order referring the case to the court for trial, sworn to as such, and an affidavit of -------------------- showing that said -------------------- is a material witness in the case, that he has been duly paid (tendered) the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States, and that he has failed to appear and has offered no valid excuse for such failure.

(*If writ has been issued add the following final paragraph:*)

In obedience, however, to the said writ of habeas corpus the respondent herewith produces before the court the body of the said ____________________, and for the reasons hereinbefore set forth respectfully prays the court to discharge the said writ.

(*If the foregoing return is made to an order to show cause, substitute the following for the final paragraph above:*)

WHEREFORE, for the reasons hereinbefore set forth the respondent respectfully prays the court to discharge the order to show cause, and dismiss the petition for the said writ of habeas corpus.

____
United States Attorney
Counsel for Respondent

(or, if filed without representation of counsel)

____
(Official designation)
Respondent

Dated ____________________, 19__.

FORM B

(Return to writ or order)

(Name of appropriate State court)

(Caption)

(*Make return as in Form A or Form C, as appropriate* (*see 215*), *substituting for the final paragraph the following:*)

Respondent herein further states that he has not produced the body of the said ____________________ because he holds him by authority of the United States as hereinbefore set forth, and that this court (your honor) is without jurisdiction to proceed in this action; and he respectfully prays this court (your honor) to discharge the said writ of habeas corpus (order to show cause, and dismiss the petition for the said writ of habeas corpus,) in accordance with the decisions of the Supreme Court of the United States in *Ableman* v. *Booth*, 62 U. S. (21 How) 506, 523–524, and *Tarble's Case*, 80 U. S. (13 Wall) 397, 409 et seq.

____
United States Attorney
Counsel for Respondent

(or, if filed without representation of counsel)

____
(Official designation)
Respondent

Dated ____________________, 19__.

FORM C

(Return to writ or order)

(Name of appropriate Federal court)

(Caption)

Return of Respondent to Writ of Habeas Corpus (*Order to Show Cause*)

To the Honorable ____________________ (court or judge):

Comes now the respondent in the above-captioned action, upon whom has been served a writ of habeas corpus (an order to show cause why a writ of habeas corpus should not issue) for the production of ____________________, and (by his attorney) making return to the said writ (order) respectfully shows to the court (judge) that he holds the said ____________________ by authority of the United States [as a member of the (here state the appropriate armed force)] [as a person subject to military jurisdiction under Article 3 of the Uniform Code of Military Justice] [as a prisoner in the custody of (an armed force) pursuant to the sentence of a general court-martial] under the following circumstances:

That the said ____________________ was duly enlisted as a member of the ____________________ (appropriate armed force) at ____________________, ____________, on ________________, 19__, for a term of __________ years. (If the offense is fraudulent enlistment, this recital should be omitted. This recital should also be omitted if the person is held as a person subject to military jurisdiction under Article 3 of the code, in which case a statement of the jurisdictional facts under that article should be inserted.)

(Here state the offense. If it is fraudulent enlistment by representing himself to be of the required age, it may be stated as follows:)

That on the __________ day of ________________, 19__, at ____________________, ____________, the said ____________________, being then under 18 years of age, did fraudulently enlist in the military service of the United States for the term of __________ years, by falsely representing himself to be over 18 years of age, to wit: ____________ years and ____________ months; and has, since the said enlistment, received pay and allowances (or either) thereunder.

(If the offense is desertion, it may be stated substantially as follows:)

That the said ____________________ deserted the said service at ____________________, ____________, on __________________, 19__, and remained absent in desertion until he was apprehended on __________________, 19__, by ____________________ and was thereupon committed to the respondent as commanding officer of the post of __________________.

That the said ____________________ has been placed in confinement (arrest) and formal charges have been preferred against him for the said offense, and an authenticated copy of the charges, and of the order under which the said ____________________ is held in confinement (arrest) are hereto appended; and that he will be brought to trial thereon as soon as practicable before a court-martial [to be convened by ____________________ (appropriate convening authority)] [convened by Special Orders No. ________, Headquarters ____________________, dated ________________, 19__, an authenticated copy of which is hereto appended].

(If the person held is a prisoner under sentence of a court-martial, the following paragraph should be substituted for the preceding paragraph:)

That the said ____________________ was duly arraigned for the offense, before a general court-martial, convened by Special Orders No. ________, Headquarters ____________________, dated ________________, 19__, was convicted thereof by that court, and was sentenced to ____________________, which sentence was duly approved on ________________, 19__, by the convening authority [(by the officer commanding for the time being) (by a successor in command to the convening authority) (by ____________________, an officer exercising general court-martial jurisdiction)], as required by Part IX, Uniform Code of Military Justice; that upon appellate review the record of trial was held to be legally sufficient to support the findings of guilty and the sentence, and the sentence was approved and affirmed as required by Part IX, Uniform Code of Military

Justice. An authenticated copy of the order promulgating the sentence as approved and affirmed is appended hereto.

(If writ has been issued add the following final paragraph:)

In obedience, however, to the said writ of habeas corpus the respondent herewith produces before the court the body of the said ____________________, and for the reasons hereinbefore set forth respectfully prays the court to discharge the said writ.

(If the foregoing return is made to an order to show cause, substitute the following final paragraph for the paragraph above:)

WHEREFORE, for the reasons hereinbefore set forth the respondent respectfully prays the court to discharge the order to show cause, and dismiss the petition for the said writ of habeas corpus.

____
United States Attorney
Counsel for Respondent

(or, if filed without representation of counsel)

____
(Official designation)
Respondent

Dated ____________________, 19__.

Appendix 1

CONSTITUTION

OF THE UNITED STATES

1787

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[1] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Caroline five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

[2] **Section. 3.** The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

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[1] This clause has been affected by the 14th and 16th amendments.

[2] This section has been affected by the 17th amendment.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and, if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[3] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

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[3] This clause has been affected by the 20th amendment.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[4] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

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[4] This clause has been affected by the 12th amendment.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President; declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United

States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Articles in Addition to, and Amendment of, the Constitution of the United States of America, Proposed by Congress, and Ratified by the Legislatures of the Several States Pursuant to the Fifth Article of the Original Constitution

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a Member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

[5] AMENDMENT XVIII

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

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[5] This article was repealed by the 21st amendment.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT XXI

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Appendix 2

THE ACT OF 5 MAY 1950

The act of 5 May 1950* contains the Uniform Code of Military Justice (Section 1) and 16 other sections. Part *a* of this appendix sets forth the Uniform Code of Military Justice. Part *b* sets forth the other sections of the act to which military personnel should have ready access.

a.

UNIFORM CODE OF MILITARY JUSTICE

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a Uniform Code of Military Justice for the government of the armed forces of the United States, unifying, consolidating, revising, and codifying the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, is hereby enacted as follows, and the articles in this section may be cited as "Uniform Code of Military Justice, Article   ".

UNIFORM CODE OF MILITARY JUSTICE

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PART I—GENERAL PROVISIONS

Article

1. Definitions.
2. Persons subject to the code.
3. Jurisdiction to try certain personnel.
4. Dismissed officer's right to trial by court-martial.
5. Territorial applicability of the code.
6. Judge advocates and legal officers.

ART. 1. Definitions.

The following terms when used in this code shall be construed in the sense indicated in this article, unless the context shows that a different sense is intended, namely:

(1) "Department" shall be construed to refer, severally, to the Department of the Army, the Department of the Navy, the Department of the Air Force, and,

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*Public Law 506, 81st Congress, c. 169, § 1, 64 Stat. 108; Title 50 U. S. C. (Chap. 22) §§ 551–736.

except when the Coast Guard is operating as a part of the Navy, the Treasury Department;

(2) "Armed force" shall be construed to refer, severally, to the Army, the Navy, the Air Force, and, except when operating as a part of the Navy, the Coast Guard;

(3) "Navy" shall be construed to include the Marine Corps and, when operating as a part of the Navy, the Coast Guard;

(4) "The Judge Advocate General" shall be construed to refer, severally, to The Judge Advocates General of the Army, Navy, and Air Force, and, except when the Coast Guard is operating as a part of the Navy, the General Counsel of the Treasury Department;

(5) "Officer" shall be construed to refer to a commissioned officer including a commissioned warrant officer;

(6) "Superior officer" shall be construed to refer to an officer superior in rank or command;

(7) "Cadet" shall be construed to refer to a cadet of the United States Military Academy or of the United States Coast Guard Academy;

(8) "Midshipman" shall be construed to refer to a midshipman at the United States Naval Academy and any other midshipman on active duty in the naval service;

(9) "Enlisted person" shall be construed to refer to any person who is serving in an enlisted grade in any armed force;

(10) "Military" shall be construed to refer to any or all of the armed forces;

(11) "Accuser" shall be construed to refer to a person who signs and swears to charges, to any person who directs that charges nominally be signed and sworn by another, and to any other person who has an interest other than an official interest in the prosecution of the accused;

(12) "Law officer" shall be construed to refer to an official of a general court-martial detailed in accordance with article 26;

(13) "Law specialist" shall be construed to refer to an officer of the Navy or Coast Guard designated for special duty (law);

(14) "Legal officer" shall be construed to refer to any officer in the Navy or Coast Guard designated to perform legal duties for a command.

ART. 2. Persons subject to the code.

The following persons are subject to this code:

(1) All persons belonging to a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; all volunteers from the time of their muster or acceptance into the armed forces of the United States; all inductees from the time of their actual induction into the armed forces of the United States, and all other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates they are required by the terms of the call or order to obey the same;

NOTE.—National Guard personnel attending service schools under Section 99, National Defense Act, are not in the armed forces of the United States and hence are not subject under the provisions of Article 2(1) to trial by courts-martial convened by the commanding officer of the service school (Dig. Op. JAG 1912–40, sec. 359(5)). See also *Johnson v. Sayre,* 158 U. S. 109.

(2) Cadets, aviation cadets, and midshipmen;

NOTE.—See Articles 1(7) and (8).

(3) Reserve personnel while they are on inactive duty training authorized by written orders which are voluntarily accepted by them, which orders specify that they are subject to this code;

(4) Retired personnel of a regular component of the armed forces who are entitled to receive pay;

(5) Retired personnel of a reserve component who are receiving hospitalization from an armed force;

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve;

(7) All persons in custody of the armed forces serving a sentence imposed by a court-martial;

(8) Personnel of the Coast and Geodetic Survey, Public Health Service, and other organizations, when assigned to and serving with the armed forces of the United States;

(9) Prisoners of war in custody of the armed forces;

NOTE.—See Articles 45 to 67, inclusive, Geneva Convention of 27 July 1929 (Prisoners of War).

(10) In time of war, all persons serving with or accompanying an armed force in the field;

NOTE.—The words "in the field" imply military operations with a view to an enemy (14 Ops. of Atty. Gen'l. p. 22 (1872)), and it has been said that in view of the technical and common acceptation of the term, the question of whether an armed force is "in the field" is not to be determined by the locality in which it may be found, but rather by the activity in which it may be engaged at any particular time (Hines *v.* Mikell, 259 F. 28, at 34). Thus forces assembled in temporary cantonments in the United States for the purpose of training preparatory for service in the actual theater of war were held to be "in the field" (Hines *v.* Mikell, supra) and a merchant ship and crew engaged in transporting troops and supplies to a battle zone were held to constitute a military expedition "in the field" (McCune *v.* Kilpatrick, 53 F. Supp. 80; In re Berue, 54 F. Supp. 252). See also *Ex parte Gerlach,* 247 F. 616; Hearings before a Subcommittee of the Committee on Armed Services, House of Representatives, Eighty-first Congress, First Session, H. R. 2498, 7–31 March, 1, 2, and 4 April 1949, pp. 872, 873.

One may be considered to be "accompanying" an armed force although he is not directly employed by such force or by the Government but works for a contractor engaged on a military project or serves on a merchant ship carrying war supplies or troops (Perlstein *v.* U. S., 151 F. 2d 167, Cert. Dism., 328 U. S. 822; In re DiBartolo, 50 F. Supp. 929; In re Berue, supra; McCune *v.* Kilpatrick, supra). In those cases, however, in which a civilian has been held to have been "accompanying" an armed force, it has appeared that he has either moved with a military operation or that his presence within a military installation or theater was not merely incidental but was connected with or dependent upon the activities of the armed force or its personnel. He must, in order to come within this class of persons subject to military law, "accompany" the armed force in fact. Although a person "accompanying" an armed force may be "serving with" it as well, the distinction is an important one, for even though a civilian's contract with the Government may have come to an end before he has committed an offense, so that it may be said he is no longer "serving with" an armed force, jurisdiction may remain on the ground that he is accompanying an armed force because of his continued connection with a military community (Perlstein *v.* U. S., supra; Grewe *v.* France, 75 F. Supp. 433). CM 329933, *Miquiabas,* 7 Bull. JAG (Army) 125 at 126.

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands;

(12) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary of a Department and which is without the continental limits of the United States and without the following Territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

NOTE.—Pertinent treaties or executive agreements should be consulted before jurisdiction is asserted under this clause.

NOTES, MISCELLANEOUS.—Other persons subject to military law: Patients in the Army and Navy General Hospital, Hot Springs, Arkansas (act 3 Mar 1909, 35 Stat. 748, as amended; 24 U. S. C. 20).

ART. 3. Jurisdiction to try certain personnel.

(*a*) Subject to the provisions of article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

NOTE.—As to the jurisdiction of United States courts to try cases involving offenses committed without the territorial limits of the United States and without the special maritime and territorial jurisdiction of the United States as defined in Title 18 U. S. C. § 7, see *U. S.* v. *Bowman,* 260 U. S. 94; and 213*c*.

(*b*) All persons discharged from the armed forces subsequently charged with having fraudulently obtained said discharge shall, subject to the provisions of article 43, be subject to trial by court-martial on said charge and shall after apprehension be subject to this code while in the custody of the armed forces for such trial. Upon conviction of said charge they shall be subject to trial by court-martial for all offenses under this code committed prior to the fraudulent discharge.

(*c*) Any person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of this code by virtue of a separation from any subsequent period of service.

ART. 4. Dismissed officer's right to trial by court-martial.

(*a*) When any officer, dismissed by order of the President, makes a written application for trial by court-martial, setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court-martial to try such officer on the charges on which he was dismissed. A court-martial so convened shall have jurisdiction to try the dismissed officer on such charges, and he shall be held to have waived the right to plead any statute of limitations applicable to any offense with which he is charged. The court-martial may, as part of its sentence, adjudge the affirmance of the dismissal, but if the court-martial acquits the accused or if the sentence adjudged, as finally approved or affirmed, does not include dismissal or death, the Secretary of the Department shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issuance.

(*b*) If the President fails to convene a general court-martial within six months from the presentation of an application for trial under this article, the Secretary of the Department shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issuance.

(*c*) Where a discharge is substituted for a dismissal under the authority of this article, the President alone may reappoint the officer to such commissioned rank and precedence as in the opinion of the President such former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to position vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and such reappointment shall be considered as actual service for all purposes, including the right to receive pay and allowances.

(*d*) When an officer is discharged from any armed force by administrative action or is dropped from the rolls by order of the President, there shall not be a right to trial under this article.

ART. 5. Territorial applicability of the code.

This code shall be applicable in all places.

ART. 6. Judge advocates and legal officers.

(*a*) The assignment for duty of all judge advocates of the Army and Air Force and law specialists of the Navy and Coast Guard shall be made upon the recommendation of The Judge Advocate General of the armed force of which they are members. The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice.

(*b*) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is authorized to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with The Judge Advocate General.

(*c*) No person who has acted as member, law officer, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act as a staff judge advocate or legal officer to any reviewing authority upon the same case.

PART II—APPREHENSION AND RESTRAINT

Article
7. Apprehension.
8. Apprehension of deserters.
9. Imposition of restraint.
10. Restraint of persons charged with offenses.
11. Reports and receiving of prisoners.
12. Confinement with enemy prisoners prohibited.
13. Punishment prohibited before trial.
14. Delivery of offenders to civil authorities.

ART. 7. Apprehension.

(*a*) Apprehension is the taking into custody of a person.

(*b*) Any person authorized under regulations governing the armed forces to apprehend persons subject to this code or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

(*c*) All officers, warrant officers, petty officers, and noncommissioned officers shall have authority to quell all quarrels, frays, and disorders among persons subject to this code and to apprehend persons subject to this code who take part in the same.

NOTE.—As to arrest and custody of members of friendly foreign forces within the United States, see sections 2 and 6, act of 30 June 1944 (58 Stat. 643; 22 U. S. C. 702, 706).

ART. 8. Apprehension of deserters.

It shall be lawful for any civil officer having authority to apprehend offenders under the laws of the United States or of any State, District, Territory, or possession of the United States summarily to apprehend a deserter from the armed forces of the United States and deliver him into the custody of the armed forces of the United States.

ART. 9. Imposition of restraint.

(*a*) Arrest is the restraint of a person by an order not imposed as a punishment for an offense directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

(*b*) An enlisted person may be ordered into arrest or confinement by any officer by an order, oral or written, delivered in person or through other persons subject to this code. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted persons of his command or subject to his authority into arrest or confinement.

(*c*) An officer, a warrant officer, or a civilian subject to this code or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated.

(*d*) No person shall be ordered into arrest or confinement except for probable cause.

(*e*) Nothing in this article shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

ART. 10. Restraint of persons charged with offenses.

Any person subject to this code charged with an offense under this code shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, such person shall not ordinarily be placed in confinement. When any person subject to this code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

ART. 11. Reports and receiving of prisoners.

(*a*) No provost marshal, commander of a guard, or master at arms shall refuse to receive or keep any prisoner committed to his charge by an officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner.

(*b*) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within twenty-four hours after such commitment or as soon as he is relieved from guard, report to the commanding officer the name of such prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment.

ART. 12. Confinement with enemy prisoners prohibited.

No member of the armed forces of the United States shall be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces of the United States.

ART. 13. Punishment prohibited before trial.

Subject to the provisions of article 57, no person, while being held for trial or the results of trial, shall be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during such period for infractions of discipline.

ART. 14. Delivery of offenders to civil authorities.

(*a*) Under such regulations as the Secretary of the Department may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

(*b*) When delivery under this article is made to any civil authority of a person undergoing sentence of a court-martial, such delivery, if followed by conviction in a civil tribunal, shall be held to interrupt the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody for the completion of the said court-martial sentence.

PART III—NON-JUDICIAL PUNISHMENT

Article
15. Commanding officer's non-judicial punishment.

ART. 15. Commanding officer's non-judicial punishment.

(*a*) Under such regulations as the President may prescribe, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers and warrant officers of his command:

(A) withholding of privileges for a period not to exceed two consecutive weeks; or

(B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or

(C) if imposed by an officer exercising general court-martial jurisdiction, forfeiture of not to exceed one-half of his pay per month for a period not exceeding one month;

(2) upon other military personnel of his command:

(A) withholding of privileges for a period not to exceed two consecutive weeks; or

(B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or

(C) extra duties for a period not to exceed two consecutive weeks, and not to exceed two hours per day, holidays included; or

(D) reduction to next inferior grade if the grade from which demoted was established by the command or an equivalent or lower command; or

(E) if imposed upon a person attached to or embarked in a vessel, confinement for a period not to exceed seven consecutive days; or

(F) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for a period not to exceed three consecutive days.

(*b*) The Secretary of a Department may, by regulation, place limitations on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers authorized to exercise such powers, and the applicability of this article to an accused who demands trial by court-martial.

(*c*) An officer in charge may, for minor offenses, impose on enlisted persons assigned to the unit of which he is in charge, such of the punishments authorized to be imposed by commanding officers as the Secretary of the Department may by regulation specifically prescribe, as provided in subdivisions (*a*) and (*b*).

(*d*) A person punished under authority of this article who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The officer who imposes the punishment, his successor in command, and superior authority shall have power to suspend, set aside, or remit any part or amount of the punishment and to restore all rights, privileges, and property affected.

(*e*) The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

PART IV—COURTS-MARTIAL JURISDICTION

Article
16. Courts-martial classified.
17. Jurisdiction of courts-martial in general.
18. Jurisdiction of general courts-martial.
19. Jurisdiction of special courts-martial.
20. Jurisdiction of summary courts-martial.
21. Jurisdiction of courts-martial not exclusive.

ART. 16. Courts-martial classified.

There shall be three kinds of courts-martial in each of the armed forces, namely:

(1) General courts-martial, which shall consist of a law officer and any number of members not less than five;

(2) Special courts-martial, which shall consist of any number of members not less than three; and

(3) Summary courts-martial, which shall consist of one officer.

ART. 17. Jurisdiction of courts-martial in general.

(*a*) Each armed force shall have court-martial jurisdiction over all persons subject to this code. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President.

(*b*) In all cases, departmental review subsequent to that by the officer with authority to convene a general court-martial for the command which held the trial, where such review is required under the provisions of this code, shall be carried out by the armed force of which the accused is a member.

ART. 18. Jurisdiction of general courts-martial.

Subject to article 17, general courts-martial shall have jurisdiction to try persons subject to this code for any offense made punishable by this code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code, including the penalty of death when specifically authorized by this code. General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.

NOTE.—See 14 as to the jurisdiction of a general court-martial under the law of war; CM 302791 *Kaukoreit*, 5 Bull. JAG (Army) 262; CM 318380 *Yabusaki*, 6 Bull. JAG (Army) 117; and CM 337089 *Aikins*, 9 Bull. JAG (Army) 71.

The limitations on the discretion of military tribunals to adjudge punishments against prisoners of war are prescribed in the Geneva Convention on Prisoners of War, 27 July 1929, some of which are:

Article 46. Punishments other than those provided for the same acts for soldiers of the national armies may not be imposed upon prisoners of war by the military authorities and courts of the detaining power.

Rank being identical, officers, non-commissioned officers, or soldiers who are prisoners of war undergoing a disciplinary punishment, shall not be subject to less favorable treatment than that provided in the armies of the detaining power with regard to the same punishment. * * *

Article 48. Prisoners of war may not be treated differently from other prisoners after having suffered the judicial or disciplinary punishment which has been imposed on them.

However, prisoners punished as a result of attempted escape may be subjected to special surveillance, which, however, may not entail the suppression of the guarantees granted prisoners by the present Convention.

Article 49. No prisoner of war may be deprived of his rank by the detaining power.

Prisoners given disciplinary punishment may not be deprived of the prerogative attached to their rank. * * *

Article 63. Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power.

ART. 19. Jurisdiction of special courts-martial.

Subject to article 17, special courts-martial shall have jurisdiction to try persons subject to this code for any noncapital offense made punishable by this code and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code except death, dishonorable discharge, dismissal, confinement in excess of six months, hard labor without confinement in excess of three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding six months. A bad-conduct discharge shall not be adjudged unless a complete record of the proceedings and testimony before the court has been made.

ART. 20. Jurisdiction of summary courts-martial.

Subject to article 17, summary courts-martial shall have jurisdiction to try persons subject to this code except officers, warrant officers, cadets, aviation cadets, and midshipmen for any noncapital offense made punishable by this code. No person with respect to whom summary courts-martial have jurisdiction shall be brought to trial before a summary court-martial if he objects thereto, unless under the provisions of article 15 he has been permitted and has elected to refuse punishment under such article. Where objection to trial by summary court-martial is made by an accused who has not been permitted to refuse punishment under article 15, trial shall be ordered by special or general court-martial, as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code except death, dismissal, dishonorable or bad-conduct discharge, confinement in excess of one month, hard labor without confinement in excess of forty-five days, restriction to certain specified limits in excess of two months, or forfeiture of pay in excess of two-thirds of one month's pay.

ART. 21. Jurisdiction of courts-martial not exclusive.

The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals.

NOTE.—A military commission to try offenses against the law of war may be appointed by any field commander or by any commander competent to appoint a general court-martial (In re Yamashita, 327 U. S. 1).

Congress has incorporated by reference as within the jurisdiction of military commissions all offenses which are defined as such by the law of war and which may constitutionally be included within that jurisdiction (Ex parte Quirin, 317 U. S. 1).

Congress has adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts and as further defined and supplemented by the Hague Convention (In re Yamashita, supra).

PART V—APPOINTMENT AND COMPOSITION OF COURTS-MARTIAL

Article
22. Who may convene general courts-martial.
23. Who may convene special courts-martial.
24. Who may convene summary courts-martial.
25. Who may serve on courts-martial.
26. Law officer of a general court-martial.
27. Appointment of trial counsel and defense counsel.
28. Appointment of reporters and interpreters.
29. Absent and additional members.

ART. 22. Who may convene general courts-martial.

(*a*) General courts-martial may be convened by—

(1) the President of the United States;

(2) the Secretary of a Department;

(3) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps;

(4) the commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the continental limits of the United States;

(5) the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps;

(6) such other commanding officers as may be designated by the Secretary of a Department; or

(7) any other commanding officer in any of the armed forces when empowered by the President.

(*b*) When any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority when deemed desirable by him.

ART. 23. Who may convene special courts-martial.

(*a*) Special courts-martial may be convened by—

(1) any person who may convene a general court-martial;

(2) the commanding officer of a district, garrison, fort, camp, station, Air Force base, auxiliary air field, or other place where members of the Army or Air Force are on duty;

(3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;

(4) the commanding officer of a wing, group, or separate squadron of the Air Force;

(5) the commanding officer of any naval or Coast Guard vessel, shipyard, base, or station; the commanding officer of any Marine brigade, regiment, detached battalion, or corresponding unit; the commanding officer of any Marine barracks, wing, group, separate squadron, station, base, auxiliary airfield, or other place where members of the Marine Corps are on duty;

(6) the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; or

(7) the commanding officer or officer in charge of any other command when empowered by the Secretary of a Department.

(*b*) When any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority when deemed advisable by him.

ART. 24. Who may convene summary courts-martial.

(*a*) Summary courts-martial may be convened by—

(1) any person who may convene a general or special court-martial;

(2) the commanding officer of a detached company, or other detachment of the Army;

(3) the commanding officer of a detached squadron or other detachment of the Air Force; or

(4) the commanding officer or officer in charge of any other command when empowered by the Secretary of a Department.

(*b*) When but one officer is present with a command or detachment he shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases brought before him. Summary courts-martial may, however, be convened in any case by superior competent authority when deemed desirable by him.

ART. 25. Who may serve on courts-martial.

(*a*) Any officer on active duty with the armed forces shall be eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(*b*) Any warrant officer on active duty with the armed forces shall be eligible to serve on general and special courts-martial for the trial of any person, other than an officer, who may lawfully be brought before such courts for trial.

(*c*) (1) Any enlisted person on active duty with the armed forces who is not a member of the same unit as the accused shall be eligible to serve on general and special courts-martial for the trial of any enlisted person who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, prior to the convening of such court, the accused personally has requested in writing that enlisted persons serve on it. After such a request, no enlisted person shall be tried by a general or special court-martial the membership of which does not include enlisted persons in a number comprising at least one-third of the total membership of the court, unless eligible enlisted persons cannot be obtained on account of physical conditions or military exigencies. Where such persons cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

(2) For the purposes of this article, the word "unit" shall mean any regularly organized body as defined by the Secretary of the Department, but in no case shall it be a body larger than a company, a squadron, or a ship's crew, or than a body corresponding to one of them.

(*d*) (1) When it can be avoided, no person in the armed forces shall be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall appoint as members thereof such persons as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

ART. 26. Law officer of a general court-martial.

(*a*) The authority convening a general court-martial shall appoint as law officer thereof an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and who is certified to be qualified for such duty by The Judge Advocate General of the armed force of which he is a member. No person shall be eligible to act as law officer in a case when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(*b*) The law officer shall not consult with the members of the court, other than on the form of the findings as provided in article 39, except in the presence of the accused, trial counsel, and defense counsel, nor shall he vote with the members of the court.

ART. 27. Appointment of trial counsel and defense counsel.

(*a*) For each general and special court-martial the authority convening the court shall appoint a trial counsel and a defense counsel, together with such assistants as he deems necessary or appropriate. No person who has acted as investigating officer, law officer, or court member in any case shall act subsequently as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant defense counsel in the same case. No person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for the defense act subsequently in the same case for the prosecution.

(*b*) Any person who is appointed as trial counsel or defense counsel in the case of a general court-martial—

(1) shall be a judge advocate of the Army or the Air Force, or a law specialist of the Navy or Coast Guard, who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or shall be a person who is a member of the bar of a Federal court or of the highest court of a State; and

(2) shall be certified as competent to perform such duties by The Judge Advocate General of the armed force of which he is a member.

(*c*) In the case of a special court-martial—

(1) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel appointed by the convening authority shall be a person similarly qualified; and

(2) if the trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or the highest court of a State, the defense counsel appointed by the convening authority shall be one of the foregoing.

ART. 28. Appointment of reporters and interpreters.

Under such regulations as the Secretary of the Department may prescribe, the convening authority of a court-martial or military commission or a court of inquiry shall appoint qualified court reporters, who shall record the proceedings of and testimony taken before such court or commission. Under like regulations the convening authority of a court-martial, military commission, or court of inquiry may appoint an interpreter who shall interpret for the court or commission.

ART. 29. Absent and additional members.

(*a*) No member of a general or special court-martial shall be absent or excused after the accused has been arraigned except for physical disability or as a result of a challenge or by order of the convening authority for good cause.

(*b*) Whenever a general court-martial is reduced below five members, the trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than five members. When such new members have been sworn, the trial may proceed after the recorded testimony of each witness previously examined has been read to the court in the presence of the law officer, the accused, and counsel.

(*c*) Whenever a special court-martial is reduced below three members, the trial shall not proceed unless the convening authority appoints new members sufficient in number to provide not less than three members. When such new members have been sworn, the trial shall proceed as if no evidence had previously been introduced, unless a verbatim record of the testimony of previously examined witnesses or a stipulation thereof is read to the court in the presence of the accused and counsel.

PART VI—PRETRIAL PROCEDURE

Article

30. Charges and specifications.
31. Compulsory self-incrimination prohibited.
32. Investigation.
33. Forwarding of charges.
34. Advice of staff judge advocate and reference for trial.
35. Service of charges.

ART. 30. Charges and specifications.

(*a*) Charges and specifications shall be signed by a person subject to this code under oath before an officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that the same are true in fact to the best of his knowledge and belief.

(*b*) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

ART. 31. Compulsory self-incrimination prohibited.

(*a*) No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(*b*) No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(*c*) No person subject to this code shall compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(*d*) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement shall be received in evidence against him in a trial by court-martial.

ART. 32. Investigation.

(*a*) No charge or specification shall be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiries as to the truth of the matter set forth in the charges, form of charges, and the disposition which should be made of the case in the interest of justice and discipline.

(*b*) The accused shall be advised of the charges against him and of his right to be represented at such investigation by counsel. Upon his own request he shall be represented by civilan counsel if provided by him, or military counsel of his own selection if such counsel be reasonably available, or by counsel appointed by the officer exercising general court-martial jurisdiction over the command. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(*c*) If an investigation of the subject matter of an offense has been conducted prior to the time the accused is charged with the offense, and if the accused was present at such investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subdivision (*b*) of this article, no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(*d*) The requirements of this article shall be binding on all persons administering this code, but failure to follow them in any case shall not constitute jurisdictional error.

ART. 33. Forwarding of charges.

When a person is held for trial by general court-martial, the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If the same is not practicable, he shall report in writing to such officer the reasons for delay.

ART. 34. Advice of staff judge advocate and reference for trial.

(*a*) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate or legal officer for consideration and advice. The convening authority shall not refer a charge to a general court-martial for trial unless he has found that the charge alleges an offense under this code and is warranted by evidence indicated in the report of investigation.

(*b*) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence may be made.

ART. 35. Service of charges.

The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of the charges upon him, or before a special court-martial within a period of three days subsequent to the service of the charges upon him.

PART VII—TRIAL PROCEDURE

Article
36. President may prescribe rules.
37. Unlawfully influencing action of court.
38. Duties of trial counsel and defense counsel.
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ART. 36. President may prescribe rules.

(*a*) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this code.

(*b*) All rules and regulations made in pursuance of this article shall be uniform insofar as practicable and shall be reported to the Congress.

ART. 37. Unlawfully influencing action of court.

No authority convening a general, special, or summary court-martial, nor any other commanding officer, shall censure, reprimand, or admonish such court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this code shall attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

ART. 38. Duties of trial counsel and defense counsel.

(*a*) The trial counsel of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings.

(*b*) The accused shall have the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel duly appointed pursuant to article 27. Should the accused have counsel of his own selection, the duly appointed defense counsel, and assistant defense counsel, if any, shall, if the accused so desires, act as his associate counsel; otherwise they shall be excused by the president of the court.

(*c*) In every court-martial proceeding, the defense counsel may, in the event of conviction, forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he may deem appropriate.

(*d*) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by article 27, perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(*e*) An assistant defense counsel of a general or special court-martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by article 27, perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused.

ART. 39. Sessions.

Whenever a general or special court-martial is to deliberate or vote, only the members of the court shall be present. After a general court-martial has finally voted on the findings, the court may request the law officer and the reporter to appear before the court to put the findings in proper form, and such proceedings shall be on the record. All other proceedings, including any other consultation of the court with counsel or the law officer shall be made a part of the record and be in the presence of the accused, the defense counsel, the trial counsel, and in general court-martial cases, the law officer.

ART. 40. Continuances.

A court-martial may, for reasonable cause, grant a continuance to any party for such time and as often as may appear to be just.

ART. 41. Challenges.

(*a*) Members of a general or special court-martial and the law officer of a general court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The court shall determine the relevancy and validity of challenges for cause, and shall not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(*b*) Each accused and trial counsel shall be entitled to one peremptory challenge, but the law officer shall not be challenged except for cause.

ART. 42. Oaths.

(*a*) The law officer, all interpreters, and, in general and special courts-martial, the members, the trial counsel, assistant trial counsel, the defense counsel, assistant defense counsel, and the reporter shall take an oath or affirmation in the presence of the accused to perform their duties faithfully.

(*b*) All witnesses before courts-martial shall be examined on oath or affirmation.

ART. 43. Statute of limitations.

(*a*) A person charged with desertion or absence without leave in time of war, or with aiding the enemy, mutiny, or murder, may be tried and punished at any time without limitation.

NOTE.—An absence without leave from 7 March 1947 to 5 February 1949, having begun at a day prior to the adoption by Congress of the Joint Resolution of 25 July 1947 (P. L. 239, 80th Cong., 61 Stat. 449) terminating the war with respect to punishment of certain military offenses when committed "in time of war," was held subject to the operation of Article of War 39 as amended by the act of 24 June 1948 (62 Stat. 604, 627) which made absence without leave committed in time of war an offense prosecution for which is never barred by lapse of time. ACM 1659, *Schauf*, 2 CMR 325, 328.

(*b*) Except as otherwise provided in this article, a person charged with desertion in time of peace or any of the offenses punishable under articles 119 through 132 inclusive shall not be liable to be tried by court-martial if the offense was committed more than three years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(*c*) Except as otherwise provided in this article, a person charged with any offense shall not be liable to be tried by court-martial or punished under article 15 if the offense was committed more than two years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command or before the imposition of punishment under article 15.

(*d*) Periods in which the accused was absent from territory in which the United States has the authority to apprehend him, or in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this article.

(*e*) In the case of any offense the trial of which in time of war is certified to the President by the Secretary of the Department to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed in this article shall be extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

(*f*) When the United States is at war, the running of any statute of limitations applicable to any offense under this code—

(1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not; or

(2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States; or

(3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation, or other termination or settlement, of any contract, subcontract or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency;

shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

ART. 44. Former jeopardy.

(*a*) No person shall, without his consent, be tried a second time for the same offense.

(*b*) No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.

(*c*) A proceeding which, subsequent to the introduction of evidence but prior to a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused shall be a trial in the sense of this article.

ART. 45. Pleas of the accused.

(*a*) If an accused arraigned before a court-martial makes any irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

(*b*) A plea of guilty by the accused shall not be received to any charge or specification alleging an offense for which the death penalty may be adjudged.

ART. 46. Opportunity to obtain witnesses and other evidence.

The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, its Territories, and possessions.

ART. 47. Refusal to appear or testify.

(*a*) Every person not subject to this code who—

(1) has been duly subpenaed to appear as a witness before any court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such court, commission, or board; and

(2) has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States; and

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which such person may have been legally subpenaed to produce;

shall be deemed guilty of an offense against the United States.

(*b*) Any person who commits an offense denounced by this article shall be tried on information in a United States district court or in a court of original criminal jurisdiction in any of the Territorial possessions of the United States, and jurisdiction is hereby conferred upon such courts for such purpose. Upon conviction, such persons shall be punished by a fine of not more than $500, or imprisonment for a period not exceeding six months, or both.

(*c*) It shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, upon the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute any person violating this article.

(*d*) The fees and mileage of witnesses shall be advanced or paid out of the appropriations for the compensation of witnesses.

NOTE.—As to other offenses by persons not subject to the code which may be committed in connection with courts-martial, see Title 18 U. S. C. §§ 206, 210, 1505, 1621, 1622.

ART. 48. Contempts.

A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder. Such punishment shall not exceed confinement for thirty days or a fine of $100, or both.

ART. 49. Depositions.

(*a*) At any time after charges have been signed as provided in article 30, any party may take oral or written depositions unless an authority competent to convene a court-martial for the trial of such charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, such an authority may designate officers to represent the prosecution and the defense and may authorize such officers to take the deposition of any witness.

(*b*) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.

(*c*) Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

(*d*) A duly authenticated deposition taken upon reasonable notice to the other party, so far as otherwise admissible under the rules of evidence, may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears—

(1) that the witness resides or is beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing; or

(2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or

(3) that the present whereabouts of the witness is unknown.

(*e*) Subject to the requirements of subdivision (*d*) of this article, testimony by deposition may be adduced by the defense in capital cases.

(*f*) Subject to the requirements of subdivision (*d*) of this article, a deposition may be read in evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the convening authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial.

ART. 50. Admissibility of records of courts of inquiry.

(*a*) In any case not capital and not extending to the dismissal of an officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible under the rules of evidence, be read in evidence by any party before a court-martial or military commission if the accused was a party before the court of inquiry and if the same issue was involved or if the accused consents to the introduction of such evidence.

(*b*) Such testimony may be read in evidence only by the defense in capital cases or cases extending to the dismissal of an officer.

(*c*) Such testimony may also be read in evidence before a court of inquiry or a military board.

ART. 51. Voting and rulings.

(*a*) Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes, which count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(*b*) The law officer of a general court-martial and the president of a special court-martial shall rule upon interlocutory questions, other than challenge, arising during the proceedings. Any such ruling made by the law officer of a general court-martial upon any interlocutory question other than a motion for a finding of not guilty, or the question of accused's sanity, shall be final and shall constitute the ruling of the court; but the law officer may change any such ruling at any time during the trial. Unless such ruling be final, if any member objects thereto, the court shall be cleared and closed and the question decided by a vote as provided in article 52, viva voce, beginning with the junior in rank.

(*c*) Before a vote is taken on the findings, the law officer of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court—

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and he shall be acquitted;

(3) that if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the Government.

ART. 52. Number of votes required.

(*a*) (1) No person shall be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.

(2) No person shall be convicted of any other offense, except by the concurrence of two-thirds of the members present at the time the vote is taken.

(*b*) (1) No person shall be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and for an offense in this code made expressly punishable by death.

(2) No person shall be sentenced to life imprisonment or to confinement in excess of ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

(*c*) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote. A tie vote on a challenge shall disqualify the member challenged. A tie vote on a motion for a finding of not guilty or on a motion relating to the question of the accused's sanity shall be a determination against the accused. A tie vote on any other question shall be a determination in favor of the accused.

ART. 53. Court to announce action.

Every court-martial shall announce its findings and sentence to the parties as soon as determined.

ART. 54. Record of trial.

(*a*) Each general court-martial shall keep a separate record of the proceedings of the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the law officer. In case the record cannot be authenticated by either the president or the law officer, by reason of the death, disability, or absence of such officer, it shall be signed by a member in lieu of him. If both the president and the law officer are unavailable for such reasons, the record shall be authenticated by two members.

(*b*) Each special and summary court-martial shall keep a separate record of the proceedings in each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the President may prescribe.

(*c*) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as authenticated.

PART VIII—SENTENCES

Article
55. Cruel and unusual punishments prohibited.
56. Maximum limits.
57. Effective date of sentences.
58. Execution of confinement.

ART. 55. Cruel and unusual punishments prohibited.

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, shall not be adjudged by any court-martial or inflicted upon any person subject to this code. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

ART. 56. Maximum limits.

The punishment which a court-martial may direct for an offense shall not exceed such limits as the President may prescribe for that offense.

ART. 57. Effective date of sentences.

(*a*) Whenever a sentence of a court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended, the forfeiture may apply to pay or allowances becoming due on or after the date such sentence is approved by the convening authority. No forfeiture shall extend to any pay or allowances accrued before such date.

(*b*) Any period of confinement included in a sentence of a court-martial shall begin to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement.

(*c*) All other sentences of courts-martial shall become effective on the date ordered executed.

ART. 58. Execution of confinement.

(*a*) Under such instructions as the Department concerned may prescribe, any sentence of confinement adjudged by a court-martial or other military tribunal whether or not such sentence includes discharge or dismissal, and whether or not such discharge or dismissal has been executed, may be carried into execution by confinement in any place of confinement under the control of any of the armed forces, or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use; and persons so confined in a penal or correctional institution not under the control of one of the armed forces shall be subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District, or place in which the institution is situated.

(*b*) The omission of the words "hard labor" in any sentence of a court-martial adjudging confinement shall not be construed as depriving the authority executing such sentence of the power to require hard labor as a part of the punishment.

PART IX—REVIEW OF COURTS-MARTIAL

Article
59. Error of law; lesser included offense.
60. Initial action on the record.
61. Same—General court-martial records.
62. Reconsideration and revision.
63. Rehearings.
64. Approval by the convening authority.
65. Disposition of records after review by the convening authority.
66. Review by the board of review.
67. Review by the Court of Military Appeals.

Article
68. Branch offices.
69. Review in the office of The Judge Advocate General.
70. Appellate counsel.
71. Execution of sentence; suspension of sentence.
72. Vacation of suspension.
73. Petition for a new trial.
74. Remission and suspension.
75. Restoration.
76. Finality of court-martial judgments.

ART. 59. Error of law; lesser included offense.

(*a*) A finding or sentence of a court-martial shall not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

(*b*) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm so much of the finding as includes a lesser included offense.

ART. 60. Initial action on the record.

After every trial by court-martial the record shall be forwarded to the convening authority, and action thereon may be taken by the officer who convened the court, an officer commanding for the time being, a successor in command, or by any officer exercising general court-martial jurisdiction.

ART. 61. Same—General court-martial records.

The convening authority shall refer the record of every general court-martial to his staff judge advocate or legal officer, who shall submit his written opinion thereon to the convening authority. If the final action of the court has resulted in an acquittal of all charges and specifications, the opinion shall be limited to questions of jurisdiction and shall be forwarded with the record to The Judge Advocate General of the armed force of which the accused is a member.

ART. 62. Reconsideration and revision.

(*a*) If a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action.

(*b*) Where there is an apparent error or omission in the record or where the record shows improper or inconsistent action by a court-martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action. In no case, however, may the record be returned—

(1) for reconsideration of a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty; or

(2) for reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this code; or

(3) for increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory.

ART. 63. Rehearings.

(*a*) If the convening authority disapproves the findings and sentence of a court-martial he may, except where there is lack of sufficient evidence in the record to support the findings, order a rehearing, in which case he shall state the reasons for disapproval. If he disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges.

(*b*) Every rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be imposed unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory.

ART. 64. Approval by the convening authority.

In acting on the findings and sentence of a court-martial, the convening authority shall approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in his discretion determines should be approved. Unless he indicates otherwise, approval of the sentence shall constitute approval of the findings and sentence.

ART. 65. Disposition of records after review by the convening authority.

(*a*) When the convening authority has taken final action in a general court-martial case, he shall forward the entire record, including his action thereon and the opinion or opinions of the staff judge advocate or legal officer, to the appropriate Judge Advocate General.

(*b*) Where the sentence of a special court-martial as approved by the convening authority includes a bad-conduct discharge, whether or not suspended, the record shall be forwarded to the officer exercising general court-martial jurisdiction over the command to be reviewed in the same manner as a record of trial by general court-martial or directly to the appropriate Judge Advocate General to be reviewed by a board of review. If the sentence as approved by an officer exercising general court-martial jurisdiction includes a bad-conduct discharge, whether or not suspended, the record shall be forwarded to the appropriate Judge Advocate General to be reviewed by a board of review.

(*c*) All other special and summary court-martial records shall be reviewed by a judge advocate of the Army or Air Force, a law specialist of the Navy, or a law specialist or lawyer of the Coast Guard or Treasury Department and shall be transmitted and disposed of as the Secretary of the Department may prescribe by regulations.

ART. 66. Review by the board of review.

(*a*) The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.

(*b*) The Judge Advocate General shall refer to a board of review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.

(*c*) In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(*d*) If the board of review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(*e*) The Judge Advocate General shall, unless there is to be further action by the President or the Secretary of the Department or the Court of Military Appeals, instruct the convening authority to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(*f*) The Judge Advocates General of the armed forces shall prescribe uniform rules of procedure for proceedings in and before boards of review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by the boards of review.

ART. 67. Review by the Court of Military Appeals.

(*a*) (1) There is hereby established a Court of Military Appeals, which shall be located for administrative purposes in the Department of Defense. The Court of Military Appeals shall consist of three judges appointed from civilian life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. Not more than two of the judges of such court shall be appointed from the same political party, nor shall any person be eligible for appointment to the court who is not a member of the bar of a Federal court or of the highest court of a State. Each judge shall receive a salary of $17,500 a year and shall be eligible for reappointment. The President shall designate from time to time one of the judges to act as Chief Judge. The Court of Military Appeals shall have power to prescribe its own rules of procedure and to determine the number of judges required to constitute a quorum. A vacancy in the court shall not impair the right of the remaining judges to exercise all the powers of the court.

(2) The terms of office of the three judges first taking office after the effective date of this subdivision shall expire, as designated by the President at the time of nomination, one on May 1, 1956, one on May 1, 1961, and one on May 1, 1966. The terms of office of all successors shall expire fifteen years after the expiration of the terms for which their predecessors were appointed, but any judge appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor.

(3) Judges of the Court of Military Appeals may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, or upon the ground of mental or physical disability, but for no other cause.

(4) If any judge of the Court of Military Appeals is temporarily unable to perform his duties because of illness or other disability, the President may designate a judge of the United States Court of Appeals to fill the office for the period of disability.

(*b*) The Court of Military Appeals shall review the record in the following cases:

(1) All cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;

(2) All cases reviewed by a board of review which The Judge Advocate General orders forwarded to the Court of Military Appeals for review; and

(3) All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

(*c*) The accused shall have thirty days from the time he is notified of the decision of a board of review to petition the Court of Military Appeals for a grant of review. The court shall act upon such a petition within thirty days of the receipt thereof.

(*d*) In any case reviewed by it, the Court of Military Appeals shall act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review. In a case which The Judge Advocate General orders forwarded to the Court of Military Appeals, such action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, such action need be taken only with respect to issues specified in the grant of review. The Court of Military Appeals shall take action only with respect to matters of law.

(*e*) If the Court of Military Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing it shall order that the charges be dismissed.

(*f*) After it has acted on a case, the Court of Military Appeals may direct The Judge Advocate General to return the record to the board of review for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President, or the Secretary of the Department, The Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(*g*) The Court of Military Appeals and The Judge Advocates General of the armed forces shall meet annually to make a comprehensive survey of the operation of this code and report to the Committees on Armed Services of the Senate and of the House of Representatives and to the Secretary of Defense and the Secretaries of the Departments the number and status of pending cases and any recommendations relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate.

ART. 68. Branch offices.

Whenever the President deems such action necessary, he may direct The Judge Advocate General to establish a branch office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office one or more boards of review. Such Assistant Judge Advocate General and any such board of review shall be empowered to perform for that command, under the general supervision of The Judge Advocate General, the duties which The Judge Advocate General and a board of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval by the President.

ART. 69. Review in the office of The Judge Advocate General.

Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by article 66, shall be examined in the office of The Judge Advocate General. If any part of the findings or sentence is found unsupported in law, or if The Judge Advocate General so directs, the record shall be reviewed by a board of review in accordance with article 66, but in such event there will be no further review by the Court of Military Appeals except pursuant to the provisions of article 67(*b*)(2).

ART. 70. Appellate counsel.

(*a*) The Judge Advocate General shall appoint in his office one or more officers as appellate Government counsel, and one or more officers as appellate defense counsel who shall be qualified under the provisions of article 27 (*b*) (1).

(*b*) It shall be the duty of appellate Government counsel to represent the United States before the board of review or the Court of Military Appeals when directed to do so by The Judge Advocate General.

(*c*) It shall be the duty of appellate defense counsel to represent the accused before the board of review or the Court of Military Appeals—

(1) when he is requested to do so by the accused; or

(2) when the United States is represented by counsel; or

(3) when The Judge Advocate General has transmitted a case to the Court of Military Appeals.

(*d*) The accused shall have the right to be represented before the Court of Military Appeals or the board of review by civilian counsel if provided by him.

(*e*) Military appellate counsel shall also perform such other functions in connection with the review of court-martial cases as The Judge Advocate General shall direct.

ART. 71. Execution of sentence; suspension of sentence.

(*a*) No court-martial sentence extending to death or involving a general or flag officer shall be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except the death sentence.

(*b*) No sentence extending to the dismissal of an officer (other than a general or flag officer), cadet, or midshipman shall be executed until approved by the Secretary of the Department, or such Under Secretary or Assistant Secretary as may be designated by him. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of any part of the sentence as approved by him. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person who is so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

(*c*) No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more shall be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals.

(*d*) All other court-martial sentences, unless suspended, may be ordered executed by the convening authority when approved by him. The convening authority may suspend the execution of any sentence, except a death sentence.

ART. 72. Vacation of suspension.

(*a*) Prior to the vacation of the suspension of a special court-martial sentence which as approved includes a bad-conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of probation. The probationer shall be represented at such hearing by counsel if he so desires.

(*b*) The record of the hearing and the recommendations of the officer having special court-martial jurisdiction shall be forwarded for action to the officer exercising general court-martial jurisdiction over the probationer. If he vacates the suspension, the vacation shall be effective, subject to applicable restrictions in article 71 (*c*), to execute any unexecuted portion of the sentence except a dismissal. The vacation of the suspension of a dismissal shall not be effective until approved by the Secretary of the Department.

(*c*) The suspension of any other sentence may be vacated by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence.

ART. 73. Petition for a new trial.

At any time within one year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more, the accused may petition The Judge Advocate General for a new trial on grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before the board of review or before the Court of Military Appeals, The Judge Advocate General shall refer the petition to the board or court, respectively, for action. Otherwise The Judge Advocate General shall act upon the petition.

ART. 74. Remission and suspension.

(*a*) The Secretary of the Department and, when designated by him, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may remit or suspend any part or amount of the unexecuted portion of any sentence, including all uncollected forfeitures, other than a sentence approved by the President.

(*b*) The Secretary of the Department may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

ART. 75. Restoration.

(*a*) Under such regulations as the President may prescribe, all rights, privileges, and property affected by an executed portion of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and such executed portion is included in a sentence imposed upon the new trial or rehearing.

(*b*) Where a previously executed sentence of dishonorable or bad-conduct discharge is not sustained on a new trial, the Secretary of the Department shall substitute therefor a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of his enlistment.

(*c*) Where a previously executed sentence of dismissal is not sustained on a new trial, the Secretary of the Department shall substitute therefor a form of discharge authorized for administrative issuance and the officer dismissed by such sentence may be reappointed by the President alone to such commissioned rank and precedence as in the opinion of the President such former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to position vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and such reappointment shall be considered as actual service for all purposes, including the right to receive pay and allowances.

ART. 76. Finality of court-martial judgments.

The appellate review of records of trial provided by this code, the proceedings, findings, and sentence of courts-martial as approved, reviewed, or affirmed as required by this code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation as required by this code, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by the Secretary of a Department as provided in article 74, and the authority of the President.

PART X—PUNITIVE ARTICLES

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ART. 77. Principals.

Any person punishable under this code who—

(1) commits an offense punishable by this code, or aids, abets, counsels, commands, or procures its commission; or

(2) causes an act to be done which if directly performed by him would be punishable by this code;

is a principal.

ART. 78. Accessory after the fact.

Any person subject to this code who, knowing that an offense punishable by this code has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct.

ART. 79. Conviction of lesser included offense.

An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or of an offense necessarily included therein.

ART. 80. Attempts.

(*a*) An act, done with specific intent to commit an offense under this code, amounting to more than mere preparation and tending but failing to effect its commission, is an attempt to commit that offense.

(*b*) Any person subject to this code who attempts to commit any offense punishable by this code shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(*c*) Any person subject to this code may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

ART. 81. Conspiracy.

Any person subject to this code who conspires with any other person or persons to commit an offense under this code shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

ART. 82. Solicitation.

(*a*) Any person subject to this code who solicits or advises another or others to desert in violation of article 85 or mutiny in violation of article 94 shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

(*b*) Any person subject to this code who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of article 99 or sedition in violation of article 94 shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct.

ART. 83. Fraudulent enlistment, appointment, or separation.

Any person who—

(1) procures his own enlistment or appointment in the armed forces by means of knowingly false representations or deliberate concealment as to his

qualifications for such enlistment or appointment and receives pay or allowances thereunder; or

(2) procures his own separation from the armed forces by means of knowingly false representations or deliberate concealment as to his eligibility for such separation;

shall be punished as a court-martial may direct.

ART. 84. Unlawful enlistment, appointment, or separation.

Any person subject to this code who effects an enlistment or appointment in or a separation from the armed forces of any person who is known to him to be ineligible for such enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct.

ART. 85. Desertion.

(*a*) Any member of the armed forces of the United States who—

(1) without proper authority goes or remains absent from his place of service, organization, or place of duty with intent to remain away therefrom permanently; or

(2) quits his unit or organization or place of duty with intent to avoid hazardous duty or to shirk important service; or

(3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact he has not been so regularly separated, or enters any foreign armed service except when authorized by the United States;

is guilty of desertion.

(*b*) Any officer of the armed forces who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to remain away therefrom permanently is guilty of desertion.

(*c*) Any person found guilty of desertion or attempted desertion shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempted desertion occurs at any other time, by such punishment, other than death, as a court-martial may direct.

ART. 86. Absence without leave.

Any member of the armed forces who, without proper authority—

(1) fails to go to his appointed place of duty at the time prescribed; or

(2) goes from that place; or

(3) absents himself or remains absent from his unit, organization, or other place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct.

ART. 87. Missing movement.

Any person subject to this code who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished as a court-martial may direct.

ART. 88. Contempt towards officials.

Any officer who uses contemptuous words against the President, Vice President, Congress, Secretary of Defense, or a Secretary of a Department, a Governor or a legislature of any State, Territory, or other possession of the United States in which he is on duty or present shall be punished as a court-martial may direct.

ART. 89. Disrespect towards superior officer.

Any person subject to this code who behaves with disrespect towards his superior officer shall be punished as a court-martial may direct.

ART. 90. Assaulting or willfully disobeying officer.

Any person subject to this code who—

(1) strikes his superior officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

ART. 91. Insubordinate conduct towards noncommissioned officer.

Any warrant officer or enlisted person who—

(1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while such officer is in the execution of his office; or

(2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or

(3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while such officer is in the execution of his office;

shall be punished as a court-martial may direct.

ART. 92. Failure to obey order or regulation.

Any person subject to this code who—

(1) violates or fails to obey any lawful general order or regulation; or

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the same; or

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.

ART. 93. Cruelty and maltreatment.

Any person subject to this code who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

ART. 94. Mutiny or sedition.

(*a*) Any person subject to this code—

(1) who with intent to usurp or override lawful military authority refuses, in concert with any other person or persons, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny;

(2) who with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person or persons, revolt, violence, or other disturbance against such authority is guilty of sedition;

(3) who fails to do his utmost to prevent and suppress an offense of mutiny or sedition being committed in his presence, or fails to take all reasonable means to inform his superior or commanding officer of an offense of mutiny

or sedition which he knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition.

(*b*) A person who is found guilty of attempted mutiny, mutiny, sedition, or failure to suppress or report a mutiny or sedition shall be punished by death or such other punishment as a court-martial may direct.

ART. 95. Arrest and confinement.

Any person subject to this code who resists apprehension or breaks arrest or who escapes from custody or confinement shall be punished as a court-martial may direct.

ART. 96. Releasing prisoner without proper authority.

Any person subject to this code who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct.

ART. 97. Unlawful detention of another.

Any person subject to this code who, except as provided by law, apprehends, arrests, or confines any person shall be punished as a court-martial may direct.

ART. 98. Noncompliance with procedural rules.

Any person subject to this code who—

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this code; or

(2) knowingly and intentionally fails to enforce or comply with any provision of this code regulating the proceedings before, during, or after trial of an accused;

shall be punished as a court-martial may direct.

ART. 99. Misbehavior before the enemy.

Any member of the armed forces who before or in the presence of the enemy—

(1) runs away; or

(2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend; or

(3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property; or

(4) casts away his arms or ammunition; or

(5) is guilty of cowardly conduct; or

(6) quits his place of duty to plunder or pillage; or

(7) causes false alarms in any command, unit, or place under control of the armed forces; or

(8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or

(9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle;

shall be punished by death or such other punishment as a court-martial may direct.

ART. 100. Subordinate compelling surrender.

Any person subject to this code who compels or attempts to compel a commander of any place, vessel, aircraft, or other military property, or of any body of members of the armed forces, to give it up to an enemy or to abandon it, or who strikes the colors or flag to an enemy without proper authority, shall be punished by death or such other punishment as a court-martial may direct.

ART. 101. Improper use of countersign.

Any person subject to this code who in time of war discloses the parole or countersign to any person not entitled to receive it or who gives to another who is entitled to receive and use the parole or countersign a different parole or countersign from that which, to his knowledge, he was authorized and required to give, shall be punished by death or such other punishment as a court-martial may direct.

ART. 102. Forcing a safeguard.

Any person subject to this code who forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

ART. 103. Captured or abandoned property.

(*a*) All persons subject to this code shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody, or control.

(*b*) Any person subject to this code who—

(1) fails to carry out the duties prescribed in subdivision (*a*) of this article; or

(2) buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or another directly or indirectly connected with himself; or

(3) engages in looting or pillaging;

shall be punished as a court-martial may direct.

ART. 104. Aiding the enemy.

Any person who—

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other thing; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or military commission may direct.

ART. 105. Misconduct as a prisoner.

Any person subject to this code who, while in the hands of the enemy in time of war—

(1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or

(2) while in a position of authority over such persons maltreats them without justifiable cause;

shall be punished as a court-martial may direct.

ART. 106. Spies.

Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces of the United States, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.

ART. 107. False official statements.

Any person subject to this code who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing the same to be false, or makes any other false official statement knowing the same to be false, shall be punished as a court-martial may direct.

ART. 108. Military property of United States—Loss, damage, destruction, or wrongful disposition.

Any person subject to this code who, without proper authority—

(1) sells or otherwise disposes of; or

(2) willfully or through neglect damages, destroys, or loses; or

(3) willfully or through neglect suffers to be lost, damaged, destroyed, sold or wrongfully disposed of;

any military property of the United States, shall be punished as a court-martial may direct.

ART. 109. Property other than military property of United States—Waste, spoil, or destruction.

Any person subject to this code who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct.

ART. 110. Improper hazarding of vessel.

(*a*) Any person subject to this code who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces shall suffer death or such other punishment as a court-martial may direct.

(*b*) Any person subject to this code who negligently hazards or suffers to be hazarded any vessel of the armed forces shall be punished as a court-martial may direct.

ART. 111. Drunken or reckless driving.

Any person subject to this code who operates any vehicle while drunk, or in a reckless or wanton manner, shall be punished as a court-martial may direct.

ART. 112. Drunk on duty.

Any person subject to this code, other than a sentinel or look-out, who is found drunk on duty, shall be punished as a court-martial may direct.

ART. 113. Misbehavior of sentinel.

Any sentinel or look-out who is found drunk or sleeping upon his post, or leaves it before he is regularly relieved, shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is committed at any other time, by such punishment other than death as a court-martial may direct.

ART. 114. Dueling.

Any person subject to this code who fights or promotes, or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall be punished as a court-martial may direct.

ART. 115. Malingering.

Any person subject to this code who for the purpose of avoiding work, duty, or service—

(1) feigns illness, physical disablement, mental lapse or derangement; or

(2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct.

ART. 116. Riot or breach of peace.

Any person subject to this code who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct.

ART. 117. Provoking speeches or gestures.

Any person subject to this code who uses provoking or reproachful words or gestures towards any other person subject to this code shall be punished as a court-martial may direct.

ART. 118. Murder.

Any person subject to this code who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill; or

(2) intends to kill or inflict great bodily harm; or

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under paragraph (1) or (4) of this article, he shall suffer death or imprisonment for life as a court-martial may direct.

ART. 119. Manslaughter.

(*a*) Any person subject to this code who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter and shall be punished as a court-martial may direct.

(*b*) Any person subject to this code who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being—

(1) by culpable negligence; or

(2) while perpetrating or attempting to perpetrate an offense, other than those specified in paragraph (4) of article 118, directly affecting the person;

is guilty of involuntary manslaughter and shall be punished as a court-martial may direct.

ART. 120. Rape and carnal knowledge.

(*a*) Any person subject to this code who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

(*b*) Any person subject to this code who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.

(*c*) Penetration, however slight, is sufficient to complete these offenses.

ART. 121. Larceny and wrongful appropriation.

(*a*) Any person subject to this code who wrongfully takes, obtains, or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, or article of value of any kind—

(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner, steals such property and is guilty of larceny; or

(2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner is guilty of wrongful appropriation.

(*b*) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct.

ART. 122. Robbery.

Any person subject to this code who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct.

ART. 123. Forgery.

Any person subject to this code who, with intent to defraud—

(1) falsely makes or alters any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or

(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered;

is guilty of forgery and shall be punished as a court-martial may direct.

ART. 124. Maiming.

Any person subject to this code who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which—

(1) seriously disfigures his person by any mutilation thereof; or

(2) destroys or disables any member or organ of his body; or

(3) seriously diminishes his physical vigor by the injury of any member or organ;

is guilty of maiming and shall be punished as a court-martial may direct.

ART. 125. Sodomy.

(*a*) Any person subject to this code who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(*b*) Any person found guilty of sodomy shall be punished as a court-martial may direct.

ART. 126. Arson.

(*a*) Any person subject to this code who willfully and maliciously burns or sets on fire an inhabited dwelling, or any other structure, movable or immovable, wherein to the knowledge of the offender there is at the time a human being, is guilty of aggravated arson and shall be punished as a court-martial may direct.

(*b*) Any person subject to this code who willfully and maliciously burns or sets fire to the property of another, except as provided in subdivision (*a*) of this article, is guilty of simple arson and shall be punished as a court-martial may direct.

ART. 127. Extortion.

Any person subject to this code who communicates threats to another person with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity of any description is guilty of extortion and shall be punished as a court-martial may direct.

ART. 128. Assault.

(*a*) Any person subject to this code who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(*b*) Any person subject to this code who—

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

ART. 129. Burglary.

Any person subject to this code who, with intent to commit an offense punishable under articles 118 through 128, inclusive, breaks and enters, in the nighttime, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct.

ART. 130. Housebreaking.

Any person subject to this code who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.

ART. 131. Perjury.

Any person subject to this code who in a judicial proceeding or course of justice willfully and corruptly gives, upon a lawful oath or in any form allowed by law to be substituted for an oath, any false testimony material to the issue or matter of inquiry is guilty of perjury and shall be punished as a court-martial may direct.

ART. 132. Frauds against the Government.

Any person subject to this code—

(1) who, knowing it to be false or fraudulent—

(A) makes any claim against the United States or any officer thereof; or

(B) presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof; or

(2) who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States or any officer thereof—

(A) makes or uses any writing or other paper knowing the same to contain any false or fraudulent statements; or

(B) makes any oath to any fact or to any writing or other paper knowing such oath to be false; or

(C) forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing the same to be forged or counterfeited; or

(3) who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the armed forces thereof, knowingly delivers to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

(4) who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States;

shall, upon conviction, be punished as a court-martial may direct.

ART. 133. Conduct unbecoming an officer and gentleman.

Any officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

ART. 134. General article.

Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

PART XI—MISCELLANEOUS PROVISIONS

Article
135. Courts of inquiry.
136. Authority to administer oaths and to act as notary.
137. Articles to be explained.
138. Complaints of wrongs.
139. Redress of injuries to property.
140. Delegation by the President.

ART. 135. Courts of inquiry.

(*a*) Courts of inquiry to investigate any matter may be convened by any person authorized to convene a general court-martial or by any other person designated by the Secretary of a Department for that purpose whether or not the persons involved have requested such an inquiry.

(*b*) A court of inquiry shall consist of three or more officers. For each court of inquiry the convening authority shall also appoint counsel for the court.

(*c*) Any person subject to this code whose conduct is subject to inquiry shall be designated as a party. Any person subject to this code or employed by the

Department of Defense who has a direct interest in the subject of inquiry shall have the right to be designated as a party upon request to the court. Any person designated as a party shall be given due notice and shall have the right to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence.

(*d*) Members of a court of inquiry may be challenged by a party, but only for cause stated to the court.

(*e*) The members, counsel, the reporter, and interpreters of courts of inquiry shall take an oath or affirmation to faithfully perform their duties.

(*f*) Witnesses may be summoned to appear and testify and be examined before courts of inquiry as provided for courts-martial.

(*g*) Courts of inquiry shall make findings of fact but shall not express opinions or make recommendations unless required to do so by the convening authority.

(*h*) Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signatures of the president and counsel for the court and forwarded to the convening authority. In case the record cannot be authenticated by the president it shall be signed by a member in lieu of the president and in case the record cannot be authenticated by the counsel for the court it shall be signed by a member in lieu of the counsel.

ART. 136. Authority to administer oaths and to act as notary.

(*a*) The following persons on active duty in the armed forces shall have authority to administer oaths for the purposes of military administration, including military justice, and shall have the general powers of a notary public and of a consul of the United States, in the performance of all notarial acts to be executed by members of any of the armed forces, wherever they may be, and by other persons subject to this code outside the continental limits of the United States:

(1) All judge advocates of the Army and Air Force;

(2) All law specialists;

(3) All summary courts-martial;

(4) All adjutants, assistant adjutants, acting adjutants, and personnel adjutants;

(5) All commanding officers of the Navy and Coast Guard;

(6) All staff judge advocates and legal officers, and acting or assistant staff judge advocates and legal officers; and

(7) All other persons designated by regulations of the armed forces or by statute.

(*b*) The following persons on active duty in the armed forces shall have authority to administer oaths necessary in the performance of their duties:

(1) The president, law officer, trial counsel, and assistant trial counsel for all general and special courts-martial;

(2) The president and the counsel for the court of any court of inquiry;

(3) All officers designated to take a deposition;

(4) All persons detailed to conduct an investigation;

(5) All recruiting officers; and

(6) All other persons designated by regulations of the armed forces or by statute.

(*c*) No fee of any character shall be paid to or received by any person for the performance of any notarial act herein authorized.

(*d*) The signature without seal of any such person acting as notary, together with the title of his office, shall be prima facie evidence of his authority.

NOTE.—In addition to the authority conferred by Article 136, the following statutes confer authority to administer oaths:

Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps or Coast Guard, detailed to conduct an investigation, and the recorder, and if there be none the presiding officer, of any military, naval, or Coast Guard board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation (R. S. 183, as amended by act 13 Feb 1911, 36 Stat. 898; 5 U. S. C. 93).

See, however, Article 30*a* as to authority to administer the oath to charges. Only officers, including commissioned warrant officers, may administer such oaths.

In all cases in which, under the laws of the United States, oaths are authorized or required to be administered, they may be administered by notaries public duly appointed in any State, District, or Territory of the United States, by clerks and prothonotaries of courts of record of any such State, District, or Territory, by the deputies of such clerks and prothonotaries, and by all magistrates authorized by the laws of or pertaining to any such State, District, or Territory to administer oaths (act 3 Jul 1926, 44 Stat. 830; 5 U. S. C. 92*a*).

Every consular officer of the United States is hereby required, whenever application is made to him therefor, within the limits of his consulate, to administer to or take from any person any oath, affirmation, affidavit, or deposition, and to perform any other notarial act which any notary public is required or authorized by law to do within the United States * * * (act 5 Apr 1906, 34 Stat. 101; 22 U. S. C. 1195).

ART. 137. Articles to be explained.

Articles 2, 3, 7 through 15, 25, 27, 31, 37, 38, 55, 77 through 134, and 137 through 139 of this code shall be carefully explained to every enlisted person at the time of his entrance on active duty in any of the armed forces of the United States, or within six days thereafter. They shall be explained again after he has completed six months of active duty, and again at the time he reenlists. A complete text of the Uniform Code of Military Justice and of the regulations prescribed by the President thereunder shall be made available to any person on active duty in the armed forces of the United States, upon his request, for his personal examination.

ART. 138. Complaints of wrongs.

Any member of the armed forces who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to any superior officer who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. That officer shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department concerned a true statement of such complaint, with the proceedings had thereon.

ART. 139. Redress of injuries to property.

(*a*) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces he may, subject to such regulations as the Secretary of the Department may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three officers and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of such commanding officer directing charges herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the damages so assessed and approved.

(*b*) Where the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportion as may be deemed just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board.

NOTE.—A municipal corporation is, for civil purposes, deemed a "person" (United States *v.* Amedy, 24 U. S. (11 Wheat.) 392, 412) and is so considered within the meaning of Article 139.

This article provides the administrative remedy for damage to or loss of property resulting from offenses denounced in Article 109.

This article is not intended to affect the provisions of 40 Stat. 705 (1918), as amended (34 U. S. C. 600) (claims for damages not occasioned by vessels) ; 60 Stat. 842 (1946), as amended (28 U. S. C. 2671 *et seq.*) (tort claims) ; or similar enactments.

ART. 140. Delegation by the President.

The President is authorized to delegate any authority vested in him under this code, and to provide for the subdelegation of any such authority.

b.

Sec. 2. If any article or part thereof, as set out in section 1 of this Act, shall be held invalid, the remainder shall not be affected thereby.

Sec. 3. No inference of a legislative construction is to be drawn by reason of the part in which any article is placed nor by reason of the catch lines of the part or the article as set out in section 1 of this Act.

Sec. 4. All offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the effective date of this Act under any law embraced in or modified, changed, or repealed by this Act may be prosecuted, punished, and enforced, and action thereon may be completed, in the same manner and with the same effect as if this Act had not been passed.

Sec. 5. This Act shall become effective on the last day of the twelfth month after approval of this Act, or on July 1, 1950, whichever date is later: *Provided*, That the provisions of article 67(*a*) of this Act shall become effective on the last day of the ninth month after approval of this Act: *Provided further*, That the provisions of section 12 of this Act shall become effective on the date of the approval of this Act.

Sec. 6. Articles of War 107, 108, 112, 113, 119, and 120 (41 Stat. 809, 810, 811), as amended, are further amended as follows:

(*a*) Delete from article 107, the words "Article 107."
(*b*) Delete from article 108, the words "Article 108."
(*c*) Delete from article 112, the words "Article 112."
(*d*) Delete from article 113, the words "Article 113."
(*e*) Delete from article 119, the words "Article 119."
(*f*) Delete from article 120, the words "Article 120."

These provisions as amended herein shall be construed to have the same force, effect, and applicability as they now have, but shall not be known as "Articles of War".

(a) *Soldiers to Make Good Time Lost.*—Every soldier who in an existing or subsequent enlistment deserts the service of the United States, or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve. (Act 4 June 1920, 41 Stat. 809, as amended by act 5 May 1950; 10 U. S. C. 1579.)

Note.—Does not apply to the naval service and the Coast Guard.

(b) *Soldiers—Separation From the Service.*—No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Army, or by sentence of a general or special court-martial. (Act 4 June 1920, 41 Stat. 809, as amended by act 5 May 1950; 10 U. S. C. 1580.)

Note.—Does not apply to the naval service and the Coast Guard.

(c) *Effects of Deceased Persons—Disposition of.*—In case of the death of any person subject to military law the commanding officer of the place of command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters; and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects, and said summary court shall have authority to collect and receive any debts due decedent's estate by local debtors and to pay the undisputed local creditors of decedent in so far as any money belonging to the deceased which may come into said summary court's possession under this article will permit, taking receipts therefor for file with said court's final report upon its transactions to the Department of the Army; and as soon as practicable after the collection of such effects said summary court shall transmit such effects and any money collected, through the Quartermaster Department, at Government expense, to the widow or legal representative of the deceased, if such be found by said court, or to the son, daughter, father, provided the father has not abandoned the support of his family, mother, brother, sister, or the next of kin in the order named, if such be found by said court, or the beneficiary named in the will of the deceased, if such be found by said court, and said court shall thereupon make to the Department of the Army a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or their addresses are not known to or readily ascertainable by said court, and the said court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than thirty days after the death of the deceased, all effects of deceased except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions, to the Department of the Army for transmission to the Auditor for the Department of the Army for action as authorized by law in the settlement of accounts of deceased officers and enlisted men of the Army.

The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment. (Act 4 June 1920, 41 Stat. 809, as amended by act 5 May 1950; 10 U. S. C. 1584.)

Note.—Does not apply to the naval service and the Coast Guard.

(d) *Inquests.*—When at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States, any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary court-martial to investigate the circumstances attending the death; and, for this purpose, such summary court-martial shall have power to summon witnesses and examine them upon oath or affirmation. He shall promptly transmit to the post or other commander a report of his investigation and of his findings as to the cause of the death. (Act 4 June 1920, 41 Stat. 810, as amended by act 5 May 1950; 10 U. S. C. 1585.)

Note.—Does not apply to the naval service and the Coast Guard.

(e) *Rank and Precedence among Regulars, Militia, and Volunteers.*—That when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. (Act 4 June 1920, 41 Stat. 811, as amended by act 7 Aug. 1947, 61 Stat. 913, and act 5 May 1950; 10 U. S. C. 1591.)

Note.—Does not apply to the naval service and the Coast Guard.

(f) *Command when Different Corps or Commands Happen to Join.*—When different corps or commands of the military forces of the United States happen to join or do duty together, the officer highest in rank of the line of the Regular Army, Marine Corps, forces drafted or called into the service of the United States, or Volunteers, there on duty, shall, subject to the provisions of the last preceding article, command the whole and give orders for what is needful in the service, unless otherwise directed by the President. (Act 4 June 1920, 41 Stat. 811, as amended by act 5 May 1950; 10 U. S. C. 1592.)

Sec. 7. (a) AUTHORITY OF NAVAL OFFICERS AFTER LOSS OF VESSEL OR AIRCRAFT.—When the crew of any naval vessel or naval aircraft are separated from their vessel or aircraft by means of its wreck, loss, or destruction, all the command and authority given to the officer of such vessel or aircraft shall remain in full force until such crew shall be regularly discharged or reassigned by competent authority.

(b) AUTHORITY OF OFFICERS OF SEPARATE ORGANIZATION OF MARINES.—When a force of marines is embarked on a naval vessel or vessels, as a separate organization, not a part of the authorized complement thereof, the authority and powers of the officers of such separate organizations of marines shall be the same as though such organization were serving at a naval station on shore, but nothing herein shall be construed as impairing the paramount authority of the commanding officer of any vessel over the vessel under his command and all persons embarked thereon.

(c) COMMANDERS' DUTIES OF EXAMPLE AND CORRECTION.—All commanding officers and others in authority in the naval service are required to show in themselves a good example of virtue, honor, patriotism, and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them; and to take all necessary and proper measures, under the laws, regulations, and customs of the naval service, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.

(d) DIVINE SERVICE.—The commanders of vessels and naval activities to which chaplains are attached shall cause divine service to be performed on Sunday, whenever the weather and other circumstances allow it to be done; and it is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of Almighty God.

(e) REVERENT BEHAVIOR.—All persons in the Navy are enjoined to behave themselves in a reverent and becoming manner during divine service.

OATH OF ENLISTMENT

Sec. 8. Every person who is enlisted in any armed force shall take the following oath or affirmation at the time of his enlistment: "I, ____________________, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice." This oath or affirmation may be taken before any officer.

NOTE.—Any commissioned officer of any component (including the reserve component), of any of the armed forces of the United States, whether or not on active duty, is authorized to administer the oath required for the enlistment of any person, the oath required for the appointment of any person to commissioned or warrant officer grade, and any other oath required by law in connection with the enlistment or appointment of any person in any of the aforesaid services. (Sec. 1, act 22 May 1950, 64 Stat. 187; 10 U. S. C. 19; 34 U. S. C. 217a–2.)

REMOVAL OF CIVIL SUITS

Sec. 9. When any civil or criminal prosecution is commenced in any court of a State of the United States against any member of the armed forces of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the armed forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed by law, and the cause shall thereupon be entered on the docket of such district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine said cause.

DISMISSAL OF OFFICERS

Sec. 10. No officer shall be dismissed from any of the armed forces except by sentence of a general court-martial, or in commutation thereof, or, in time of war, by order of the President; but the President may at any time drop from the rolls of any armed force any officer who has been absent without authority from his place of duty for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a Federal or State penitentiary or correctional institution.

Sec. 11. The proviso of section 3 of the Act of April 9, 1906 (34 Stat. 104, ch. 1370), is amended to read as follows:

"*Provided*, That such midshipman shall not be confined in a military or naval prison or elsewhere with men who have been convicted of crimes or misdemeanors; and such finding and sentence shall be subject to review in the manner prescribed for general court-martial cases."

Sec. 12. Under such regulations as the President may prescribe, The Judge Advocate General of any of the armed forces is authorized upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad-conduct discharge, previously executed, a form of discharge authorized for administrative issuance, in any court-martial case involving offenses committed during World War II in which application is made within one year after termination of the war, or after its final disposition upon initial appellate review whichever is the later: *Provided*, That only one such application for a new trial may be entertained with regard to any one case: *And provided further*, Within the meaning of this section and of article of war 53, World War II shall be deemed to have ended as of the effective date of this Act.

QUALIFICATIONS OF THE JUDGE ADVOCATES GENERAL

Sec. 13. Hereafter The Judge Advocate General of an armed force, exclusive of the present incumbents and exclusive of the Coast Guard, shall be appointed from among those officers who at the time of such appointment are members of the bar of a Federal court or the highest court of a State or Territory and who have had not less than a total of eight years' experience in legal duties as commissioned officers.

Sec. 14. The following sections or parts thereof of the Revised Statutes or Statutes at Large are hereby repealed. Any substantive rights or liabilities existing under such sections or parts thereof prior to the effective date of this Act shall not be affected by this repeal, and this Act shall not be effective to authorize trial or punishment for any offense if such trial or punishment is barred by the provisions of existing law:

(a) Chapter II of the Act of June 4, 1920 (41 Stat. 759, 787–811, ch. 227), as amended, except Articles of War 107, 108, 112, 113, 119, and 120;

(b) Revised Statutes, 1228 through 1230;

(c) Act of January 19, 1911 (36 Stat. 894, ch. 22);

(d) Paragraph 2 of section 2 of the Act of March 4, 1915 (38 Stat. 1062, 1084, ch. 143);

(e) Revised Statutes 1441, 1621, and 1624, articles 1 through 14 and 16 through 63, as amended;

(f) The provision of section 1457, Revised Statutes, which subjects officers retired from active service to the rules and articles for the government of the Navy and to trial by general court-martial;

(g) Section 2 of the Act of June 22, 1874 (18 Stat. 191, 192, ch. 392);

(h) The provision of the Act of March 3, 1893 (27 Stat. 715, 716, ch. 212), under the heading "Pay, Miscellaneous", relating to the punishment for fraudulent enlistment and receipt of any pay or allowances thereunder;

(i) Act of January 25, 1895 (28 Stat. 639, ch. 45), as amended;

(j) Provisions contained in the Act of March 2, 1895 (28 Stat. 825, 838, ch. 186), as amended, under the heading "Naval Academy", relating to the power of the Secretary of the Navy to convene general courts-martial for the trial of naval cadets (title changed to "midshipmen" by Act of July 1, 1902, 32 Stat. 662, 686, ch. 1368), his power to approve proceedings and execute sentences of such courts-martial, and the exceptional provision relating to approval, confirmation, and carrying into effect of sentences of suspension and dismissal;

(k) Sections 1 through 12 and 15 through 17 of the Act of February 16, 1909 (35 Stat. 621, 623, ch. 131);

(l) The provision of the Act of August 29, 1916 (39 Stat. 556, 573, ch. 417), under the heading "Hospital Corps", making officers and enlisted men of the Medical Department of the Navy who are serving with a body of marines detached for service with the Army subject to the rules and Articles of War while so serving;

(m) The provisions in the Act of August 29, 1916 (39 Stat. 556, 586, ch. 417), under the heading "Administration of Justice";

(n) Act of October 6, 1917 (40 Stat. 393, ch. 93);

(o) Act of April 2, 1918 (40 Stat. 501, ch. 39);

(p) Act of April 25, 1935 (49 Stat. 161, ch. 81);

(q) The provision of section 6, title I, of the Naval Reserve Act of 1938 (52 Stat. 1175, 1176, ch. 690), making members of the Fleet Reserve and officers and enlisted men who have been or may be transferred to the retired list of the Naval Reserve Force or the Naval Reserve or the honorary retired list with pay subject to the laws, regulations, and orders for the government of the Navy;

(r) Section 301, title III, of the Naval Reserve Act of 1938 (52 Stat. 1175, 1180, ch. 690);

(s) Act of March 22, 1943 (57 Stat. 41, ch. 18);

(t) Act of April 9, 1943 (57 Stat. 58, ch. 36);

(u) Title 14, United States Code, sections 4(f) and 758;

(v) All of chapter 15 of title 14, United States Code, including the chapter number, the analysis, and the reference thereto in the table of contents to part I.

Sec. 15. Section 227 of title 14, United States Code, is amended by striking out the word "dismissal" and inserting in lieu thereof the word "discharge" in the catchline; and by striking out the word "dismiss" and inserting in lieu thereof the word "discharge" in the text.

Sec. 16. (*a*) Chapter 13 of title 14, United States Code, is amended by adding at the end thereof the following new sections:

"§ 508. Deserters; arrest of by civil authorities; penalties.

"(a) Any civil officer having authority to arrest offenders under the laws of the United States or of any State, Territory, or District, may arrest summarily a deserter from the Coast Guard and deliver him into the custody of Coast Guard authorities. The Commandant may, pursuant to applicable regulations, provide for reimbursement for the transportation and other necessary expenses to effectuate such delivery.

"(b) No person who is convicted by court-martial for desertion from the Coast Guard in time of war, and as the result of such conviction is dismissed or dishonorably discharged from the Coast Guard shall afterwards be enlisted, appointed, or commissioned in any military or naval service under the United States, unless the disability resulting from desertion, as established by this section, is removed by a board of commissioned officers of the Coast Guard convened for consideration of the case, and the action of the board is approved by the Secretary; or unless he is restored to duty in time of war.

"§ 509. Prisoners; allowances to; transportation.

"(a) Persons confined in prisons in pursuance of the sentence of a Coast Guard court shall, during such confinement, be allowed a reasonable sum, not to exceed $3 per month, for necessary prison expenses, and shall upon discharge be furnished with suitable civilian clothing and paid a gratuity, not to exceed $25. Such allowance shall be made in amounts to be fixed by, and in the discretion of, the Secretary and only in cases where the prisoners so discharged would otherwise be unprovided with suitable clothing or without funds to meet their immediate needs.

"(b) The Commandant may transport to their homes or places of enlistment, as he may designate, all discharged prisoners; the expense of such transportation shall be paid out of any money to the credit of prisoners when discharged."

(*b*) The analysis of chapter 13 of said title 14, United States Code, is amended by adding at the end thereof the following new items:

"508. Deserters; arrest of by civil authorities; penalties.

"509. Prisoners; allowances to; transportation."

Sec. 17. There is hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary to carry out the purposes of this Act.

Approved May 5, 1950.

Appendix 3

PUNISHMENT UNDER ARTICLE 15

NON-JUDICIAL PUNISHMENT FORMS

a. RECORD OF PUNISHMENT UNDER ARTICLE 15 UPON ENLISTED PERSONS.

UNIT PUNISHMENT BOOK

Glassborn, Peter E.	Pvt	RA 16824364	Co A, 109 Inf
NAME, LAST NAME FIRST	GRADE	SERVICE NUMBER	ORGANIZATION

Offense	Date and place of commission	Punishment	By whom imposed	Date of notice to accused	Decision on appeal if any	Mitigation, remission, suspension, or setting aside	Remarks	Initials of immediate CO	Rights understood; Initials of accused
Disorderly in barracks	2 Oct 1951, Ft Knox, Ky	Reprimand; 10 days extra duties	CO, Co A	3 Oct 1951	No App	None	None	JBS	PEG

(NOTE.—One page is given to each person. An alphabetical index will be found of assistance in consulting the record.)

b. IMPOSITION OF PUNISHMENT UNDER ARTICLE 15 UPON OFFICERS.

(1) *Army and Air Force.*

HEADQUARTERS
THIRTIETH AIR FORCE
Andrews Air Force Base
Maryland

24 October 1951

SUBJECT: Disciplinary Punishment
THRU: Commanding General
11th Fighter Wing
Andrews Air Force Base, Maryland
TO: Major John J. Hawk, USAF
415th Fighter Squadron
Andrews Air Force Base, Maryland

1. It has been reported that on or about 2200 hours, 20 October 1951, at South Post, Fort Myer, Virginia, you drove an automobile at 40 miles per hour on B Street which was plainly marked by signs showing the speed limit to be 20 miles per hour. It is also reported that you behaved in a rude and overbearing manner toward a military policeman who cautioned you about your violation of local traffic regulations.

2. The Commanding General, Thirtieth Air Force, proposes to impose punishment upon you pursuant to Article 15 as to such offenses unless trial by court-martial is demanded. You will acknowledge receipt of this communication by indorsement through proper channels, and you will state therein whether you demand trial in lieu of action under Article 15. You may submit any matter in mitigation, extenuation, or defense.

BY COMMAND OF MAJOR GENERAL FALCON:

/s/ John Crow
/t/ JOHN CROW
Colonel, USAF
Adjutant General

(NOTE.—Under the provisions of 133*a*, the letter notifying the accused of the intention to impose punishment and all subsequent indorsements will be through proper military channels. Indorsements by intermediate commanders through whom the communication may pass are not shown on this form. Accordingly, the indorsements are not numbered.)

——— Ind

415th Fighter Squadron, Andrews Air Force Base, Maryland, 27 October 1951
TO: CG, Thirtieth Air Force, Andrews Air Force Base, Maryland
THRU: CO, 415th Fighter Group, Andrews Air Force Base, Maryland

Receipt is acknowledged. Trial by court-martial is not demanded. No matters in mitigation, extenuation, or defense are submitted.

/s/ John J. Hawk
/t/ JOHN J. HAWK
Major, USAF

——— Ind

Hq Thirtieth Air Force, Andrews Air Force Base, Maryland, 29 October 1951
TO: Major John J. Hawk, USAF, 415th Fighter Squadron, Andrews Air Force Base, Maryland
THRU: CG, 11th Fighter Wing, Andrews Air Force Base, Maryland

1. You are hereby ordered to forfeit $25.00 of your pay and you will take necessary action to insure that this forfeiture is promptly effected.

2. You are hereby reprimanded. In violating the post traffic regulations of an Army installation and in behaving yourself in a reprehensible manner towards a military policeman who was performing his duty in bringing your infractions to your attention, you have conducted yourself in a manner prejudicial to good order and military discipline. It is expected that your future conduct will set an example of decorum to be followed by your associates in the service.

3. You are advised of your right to appeal in accordance with paragraph 134, MCM, 1951. You are directed to reply further by indorsement and to state therein the date of receipt of this indorsement and any appeal you may desire to make.

/s/ Richard Falcon
/t/ RICHARD FALCON
Major General, USAF
Commanding

——— Ind

415th Fighter Squadron, Andrews Air Force Base, Maryland, 31 October 1951
TO: CG, Thirtieth Air Force, Andrews Air Force Base, Maryland
THRU: CO, 415th Fighter Group, Andrews Air Force Base, Maryland

1. Received 29 October 1951. Contents noted.
2. I do not appeal from this punishment.

/s/ John J. Hawk
/t/ JOHN J. HAWK
Major, USAF

(2) *Navy and Coast Guard.*

From: Commander Service Force, Atlantic Fleet 1 August 1951
To: Lieutenant A. B. C————, U. S. Navy
Via: Commanding Officer, ————, U. S. S. ————
Subj: Dereliction in performance of duty—Imposition of disciplinary punishment and letter of reprimand for
Ref: Board of Investigation convened 11 July 1951 by order Comservlant

1. The finding of facts in the referenced investigation, in which you were a party, reveals that you were derelict in the performance of your duties in that on 5 July 1951 as officer of the deck of the first watch on board the U. S. S. ———— at anchor in Hampton Roads, Norfolk, Virginia, you failed and neglected to require frequent and regular inspection of the ship's small boat which was then in the water and tied up at the fan tail. As a result of your negligence, the fact that the small boat was adrift was not discovered until it had beached itself with consequent damage to the boat. Therefore, a forfeiture of $100.00 of your pay for one month is hereby imposed.

2. In addition, you are hereby reprimanded for your negligence in this matter which was contrary to the standards of alertness and good seamanship required of all watch officers.

3. By copy of this letter your commanding officer is hereby directed to make notation of this letter in your next fitness report.

4. You are advised of your right to appeal in accordance with paragraph 134, MCM, 1951. You are directed to reply without delay, through official channels, and to state therein the date of receipt of this communication and any appeal you may desire to make.

(Signed) ____________
D. E. F ____________

Copy to:
Commanding Officer
U. S. S. ————

(NOTE.—When disciplinary punishment is based on a report of facts established by a court of inquiry or board of investigation before which the accused was not a party, the accused shall be informed that disciplinary punishment is contemplated in his case and of the specific offense forming the basis therefor. The accused will also be informed that he is privileged to make a written statement setting forth any cause why such disciplinary punishment should not be imposed or any other pertinent matter in connection therewith.)

Appendix 4

FORMS FOR ORDERS APPOINTING COURTS-MARTIAL

a. GENERAL COURT-MARTIAL APPOINTING ORDERS.

(1) *Appointing orders.*

____

____
(Designation of command of officer convening court-martial)

__________________________ ____________________
(Place) (Date)

NOTE 1.—The heading of orders appointing general courts-martial (including letterhead, place, date, etc.) may be as indicated, or as prescribed in appropriate departmental regulations. This appendix shows only the content required to be set forth in all appointing orders. Abbreviations authorized in the department may be used.

A general court-martial is hereby ordered to convene (at) (on board) ——— at ——— hours on ——— 19—, or as soon thereafter as practicable, for the trial of such persons as may properly be brought before it. The court will be constituted as follows:

LAW OFFICER

(Lieutenant Commander) (Major) ———, (*), certified in accordance with Article 26*a*

MEMBERS

(Captain) (Colonel)———————————, (*)
(Commander) (Lieutenant Colonel)———————————, (*)
(Commander) (Lieutenant Colonel)———————————, (*)
(Lieutenant Commander) (Major)———————————, (*)
(Lieutenant Commander) (Major)———————————, (*)
(Lieutenant) (Captain)———————————, (*)

COUNSEL

(Lieutenant Commander) (Major) ———,	(*) TRIAL COUNSEL, certified in accordance with Article 27*b*
(Lieutenant, jg) (First Lieutenant) ———,	(*) ASSISTANT TRIAL COUNSEL, not certified in accordance with Article 27*b*
(Lieutenant Commander) (Major) ———,	(*), DEFENSE COUNSEL, certified in accordance with Article 27*b*
(Lieutenant) (Captain)————,	(*), ASSISTANT DEFENSE COUNSEL, not certified in accordance with Article 27*b*

NOTE 2.—Appointing orders may be signed personally by the officer having authority to convene the general court-martial, or may be authenticated in any manner prescribed in appropriate departmental regulations.

NOTE 3.—Legal qualifications of all counsel of a general court-martial are shown in the appointing orders. See 6*b* and *d*.

NOTE 4.—( ). The further identification of the officer members of the court, the law officer, and counsel, by service number, organization, etc., will be as prescribed in appropriate departmental regulations, or as is customary in the particular service.

NOTE 5.—When a commanding officer is designated by the Secretary of a Department pursuant to Article 22*a*(6) or empowered by the President pursuant to Article 22*a*(7) to convene general courts-martial (5*a*(2)), the appointing order will cite such authorization in the first paragraph:

"Pursuant to authority contained in (par. —, General Orders ——, Dept. ———, ——— 19—) (Navy Department's file A 17-1151 (1) (310126), ——— 19—) (—————), a general court-martial is hereby ordered to convene," etc.

NOTE 6.—A succession of orders modifying an appointing order may result in serious errors. When practicable, it should be avoided by appointing a new court. See 37*c*(1). It is not deemed advisable to issue an order dissolving a court-martial, and when a new court is appointed to replace one in existence, the following sentence should merely be added, below the names of the personnel of the court (36*b*), to the order appointing the new court:

"All unarraigned cases in the hands of the trial counsel of the general court-martial convened by ———, will be brought to trial before the court hereby appointed."

(2) *Order amending appointing orders.*

(*a*) *Adding members.*

NOTE 7.—For heading and closure, see Notes 1 and 2 above.

NOTE 8.—When an enlisted person has requested enlisted members on the court which tries him, the following may be used when his case has already been referred to a court without enlisted membership to the number of one-third. See 36*c*(2)(*a*). This general type of order may also be modified and used to appoint additional officer members to the court (37*a*).

The text of such an appointing order in the Army might read as follows:

The following members are aptd to GCM convened by par — SO —— Hq 61st Inf Div (for the trial of PRIVATE ———, RA 12 345 678, Co M 61st Inf, only) (for the trial of enlisted persons who make a timely request, pursuant to Article 25*c*, that enlisted persons serve on it).

MSGT————————	Co B 61st Inf
MSGT————————	Hq Btry 3d FA Bn
SFC————————	Co C 1st Inf
SGT————————	Co G 1st Inf

NOTE 9.—Additional members may be detailed for one specified case only, or for all cases which may come before the court.

NOTE 10.—An order appointing enlisted persons as members of a general court-martial must show *the unit* to which each is assigned. See 4*a*, 36*b*, and Article 25*c*.

(*b*) *Replacing law officer.*

NOTE 11.—For heading and closure, see Notes 1 and 2 above. This form may be modified to replace a member of the court or counsel.

(Lieutenant Commander) (Major) ———, (*Note 4 above), certified in accordance with Article 26*a*, is appointed Law Officer of the general court-martial convened by ———, vice (Lieutenant) (Captain) ———, (*Note 4 above), relieved.

b. SPECIAL COURT-MARTIAL APPOINTING ORDERS.

NOTE 12.—Same as for general courts-martial, except that no law officer is appointed and the manner of stating legal qualifications of counsel is different. Qualifications of counsel or their lack of qualifications in the sense of Article 27 must be shown in the appointing order (6*c* and *d*). If counsel is qualified to act as counsel before a general court-martial (Art. 27*c*(1)), the phrase, "certified in accordance with Article 27*b*," will be used. If counsel is a judge advocate, a law specialist, or a member of the bar of a Federal court or the highest court of a State (Art. 27*c*(2)), but has not been certified in accordance with Article 27*b*, the phrases, "judge advocate," "law specialist," or "member of the bar of ———," respectively, will be used. If counsel has none of the foregoing legal qualifications, the phrase, "not a lawyer in the sense of Article 27," will be used. In a particular case, an appointing order might list counsel and their legal qualifications or lack of legal qualifications, as follows:

(Lieutenant) (Captain)———, (*Note 4 above), TRIAL COUNSEL, (Judge Advocate) (Law Specialist)

(Ensign) (Second Lieutenant)_, (*Note 4 above), ASSISTANT TRIAL COUNSEL, not a lawyer in the sense of Article 27

(Lieutenant Commander) (Major)————, (*Note 4 above), DEFENSE COUNSEL, certified in accordance with Article 27*b*

(Lieutenant) (Captain)______ (*Note 4 above), ASSISTANT DEFENSE COUNSEL, member of Bar of (Supreme Court of Ohio) (U. S. District Court, District of New Jersey)

NOTE 13.—When desirable, a convening authority may specify in the order the names of the person or persons to be tried. See Notes 8 and 9, above, for the use of "only" in appointing orders.

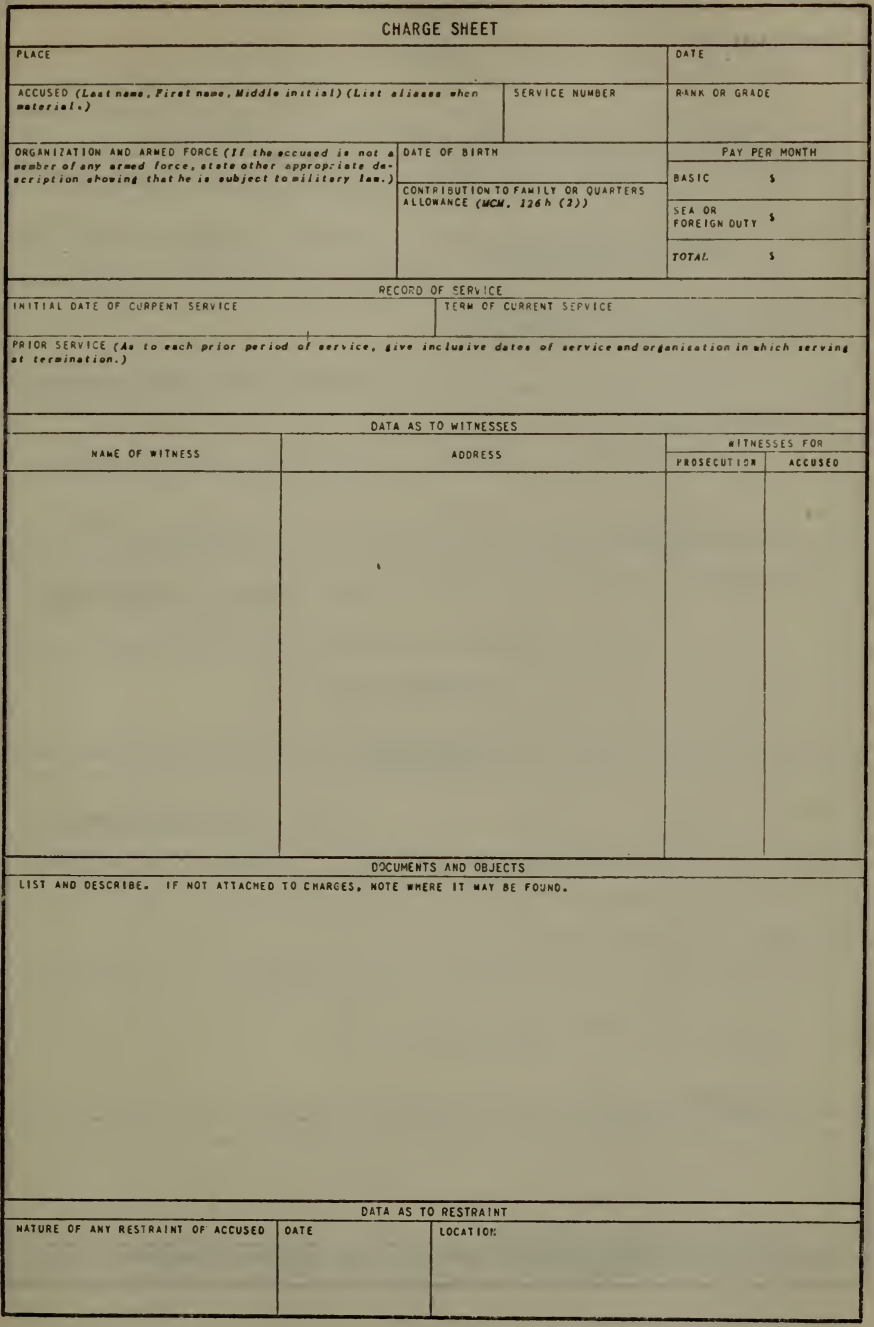
c. SUMMARY COURT-MARTIAL APPOINTING ORDERS.

NOTE 14.—As to heading, signature, or authentication, etc., see Notes 1 and 2, above.

Effective this date (Major) (Lieutenant Commander) ————, (*Note 4. above), is appointed a summary court-martial.

Appendix 5

CHARGE SHEET



CHARGE SHEET

PLACE		DATE
ACCUSED *(Last name, First name, Middle initial) (List aliases when material.)*	SERVICE NUMBER	RANK OR GRADE

ORGANIZATION AND ARMED FORCE *(If the accused is not a member of any armed force, state other appropriate description showing that he is subject to military law.)*	DATE OF BIRTH	PAY PER MONTH	
		BASIC	$
	CONTRIBUTION TO FAMILY OR QUARTERS ALLOWANCE *(MCM, 126h (2))*	SEA OR FOREIGN DUTY	$
		TOTAL	$

RECORD OF SERVICE

INITIAL DATE OF CURRENT SERVICE	TERM OF CURRENT SERVICE

PRIOR SERVICE *(As to each prior period of service, give inclusive dates of service and organization in which serving at termination.)*

DATA AS TO WITNESSES

NAME OF WITNESS	ADDRESS	WITNESSES FOR	
		PROSECUTION	ACCUSED

DOCUMENTS AND OBJECTS

LIST AND DESCRIBE. IF NOT ATTACHED TO CHARGES, NOTE WHERE IT MAY BE FOUND.

DATA AS TO RESTRAINT

NATURE OF ANY RESTRAINT OF ACCUSED	DATE	LOCATION

1

Charge : **Violation of the Uniform Code of Military Justice, Article**

Specification

If this space is insufficient for all charges and specifications, they will be set forth numerically, front to back, on separate sheets attached to this page.

2

CHARGE SHEET

SIGNATURE OF ACCUSER	RANK	ORGANIZATION

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this ________ day of ______________________, 19____, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

SIGNATURE

RANK AND ORGANIZATION OF OFFICER ADMINISTERING OATH

OFFICIAL CHARACTER, AS ADJUTANT, SUMMARY COURT, ETC. SEE PARAGRAPH 29e, MCM, 1951, AND ARTICLES 30a AND 136.

Officer administering oath must be a commissioned officer.

DATE

I have this date informed the accused of the charges against him.

SIGNATURE

RANK AND ORGANIZATION

DESIGNATION OF COMMAND OF OFFICER EXERCISING SUMMARY COURT-MARTIAL JURISDICTION

PLACE

DATE

The sworn charges above were received at ________ hours, this date.

FOR THE COMMANDING [1] ______________________________

SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SIGNING

1ST INDORSEMENT

DESIGNATION OF COMMAND OF CONVENING AUTHORITY

PLACE

DATE, 19____

Referred for trial to the ____________ court-martial appointed by ____________________

____

__________________, ______________________, 19___, subject to the following instructions: [2] ____.

BY [1] ______________________ of ______________________:
COMMAND OR ORDER

SIGNATURE, RANK, AND OFFICIAL CAPACITY OF OFFICER SIGNING

I have served a copy hereof on each of the above-named accused, this ________ day of ______________________________, 19____.

SIGNATURE

RANK AND ORGANIZATION OF TRIAL COUNSEL

[1] *When an appropriate commander signs personally, inapplicable words are stricken out.* [2] *Relative to proper instructions which may be included in the indorsement of reference for trial, see par. 33j(1), MCM 1951. If none, so state.*

APPENDIX 5

Fill in blank with numbers of pertinent charges and specifications or "all specifications and charges," as may be appropriate. For use unless departmental regulations prevent such election.

THE ACCUSED HAS BEEN PERMITTED AND HAS ELECTED TO REFUSE PUNISHMENT UNDER ARTICLE 15 AS TO

RANK AND ORGANIZATION OF OFFICER EXERCISING JURISDICTION UNDER ARTICLE 15	SIGNATURE

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL	CASE NO. *(Inserted by convening authority)*

TO BE FILLED IN BY THE ACCUSED

I ☐ CONSENT ☐ OBJECT TO TRIAL BY SUMMARY COURT-MARTIAL	SIGNATURE OF ACCUSED

TO BE FILLED IN BY SUMMARY COURT IF APPLICABLE

When an accused has been permitted and has elected to refuse punishment under Article 15, trial by summary court-martial may proceed despite his objection.

1. THE ACCUSED, HAVING REFUSED TO CONSENT IN WRITING TO TRIAL BY SUMMARY COURT-MARTIAL AND NOT HAVING BEEN PERMITTED TO REFUSE PUNISHMENT UNDER ARTICLE 15, THE CHARGES ARE HEREWITH RETURNED TO THE CONVENING AUTHORITY.

RANK AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

2. WAS THE ACCUSED ADVISED IN ACCORDANCE WITH PARAGRAPH 79*d*, MCM, 1951? ☐ YES

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR REMARKS
			NUMBER OF PRIOR CONVICTIONS CONSIDERED

PLACE	DATE
RANK AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

Enter after signature, "Only officer present with command," if such is the case.

TO BE FILLED IN BY CONVENING AUTHORITY

ORGANIZATION	PLACE	DATE

ACTION OF CONVENING AUTHORITY

RANK AND ORGANIZATION OF CONVENING AUTHORITY	SIGNATURE COMMANDING

ENTERED ON APPROPRIATE PERSONNEL RECORDS IN CASE OF CONVICTION.

RANK AND DESIGNATION OF OFFICER RESPONSIBLE FOR THE ACCUSED'S RECORDS.	SIGNATURE

NOTE: Summary of evidence, if required by the convening or higher authority, will be attached on separate pages.

Appendix 6

FORMS FOR CHARGES AND SPECIFICATIONS

a. INSTRUCTIONS.

1. Use of forms.—These forms are to be used in drafting charges and specifications, not only for the offenses specifically provided for, but as they may be adapted to like offenses. The suggested forms do not as a matter of law exclude other methods of alleging the same offenses, but the appropriate form listed with a punitive article setting forth a specific offense is prescribed for use, when properly completed, as a sufficient allegation of that offense. Except to fill in the blanks with the information required, such a form should not ordinarily be added to or deviated from. As to general principles of drafting specifications when an offense is not provided for herein, see 28.

2. Abbreviations.—Dates and times should be written in Arabic numerals, and the designation of organization or command may include Roman or Arabic numerals and the abbreviations "U. S." and "U. S. S." Otherwise, abbreviations should not be used in specifications.

3. Numbering of charges and specifications.—When there is more than one charge, the charges should be numbered, using the Roman numerals I, II, etc. When there is more than one specification under a charge, the specifications under that charge should be numbered, using the Arabic numerals 1, 2, etc. Additional charges (24*b*) are numbered in the same manner as the original charge; a single added charge is designated simply "Additional Charge," but if more than one, they are numbered Additional Charge I, Additional Charge II, etc. Specifications under additional charges are designated as prescribed above. The term "Additional" is not used in connection with the specifications.

4. Name and description of the accused.—The name of the accused as stated in the specification should include his first name, middle name or initial, and, except in a case in which the jurisdiction of the court over the person is not dependent upon his being a person subject to the Uniform Code of Military Justice (e. g., see Arts. 104, 106), should be accompanied by such descriptive language of rank, grade, armed force, organization, or position as will show that he is a person subject to the code, and therefore subject to the jurisdiction of the court as to persons. The service number of the accused is not alleged in the specification. In the ordinary case of an enlisted person, for example, the specification would read, "In that Private John J. Smith, U. S. Army, Company A, 7th Infantry, did," etc.; or, "In that James P. Jones, yeoman, third class, U. S. Navy, U. S. S. ——, did," etc.; or "In that Corporal Harold L. Brown, U. S. Air Force, Headquarters and Headquarters Squadron, 402d Bombardment Group, did," etc. A person on active duty belonging to a reserve component of the Navy, Marine Corps, or Coast Guard should be described as such; for example, "In that Charles L. White, lieutenant, U. S. Naval Reserve, U. S. S. ——, on active duty, did," etc.

In the case of persons subject to the code under Article 2, subsections (3) through (12), or subject to trial by court-martial under Article 3 or 4, a description of the accused's position or status which will indicate the basis of jurisdiction of a court-martial should be averred; e. g., John Jones, (Captain, U. S. Air Force Reserve, on inactive duty training authorized by written orders which were voluntarily accepted by him, which orders specified he was subject to the

Uniform Code of Military Justice) (a person in custody of ——— serving a sentence imposed by a court-martial) (a member of the Public Health Service assigned to and serving with ———) (a person within ———, an area under the control of the Secretary of ———) (a person convicted of having obtained a fraudulent discharge) (a former major, U. S. Army, who was dismissed by order of the President and has made a written application for trial by court-martial), etc.

5. **Use of aliases.**—If the accused is known by more than one name, as when without discharge a person enlists two or more times, each time under a different name, he should be charged under the name he admits to be his true name. If there be no such admission, he should be charged under the name, etc., pertaining to his first unterminated enlistment with the other names, under aliases; thus, "Private John P. Smith, U. S. Army, Company B, 7th Infantry, alias John Brown, seaman, U. S. Coast Guard."

6. **In case of change of rank or grade.**—When the rank or grade of the accused has changed since the date of an alleged offense, the accused should be designated by his present grade followed by a statement of his grade at the date of the alleged offense; thus, "In that A B, seaman, ————, then gunner's mate, third class, ————, did," etc.

7. **Time and place of offense.**—The time and place of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand what particular act or omission he is called upon to defend. It is proper pleading to allege in a specification that a certain offense occurred "on or about" a certain day, "at or near" a certain place, or, if it is necessary to be more explicit as to the time, "at or about" a certain hour, using a 24-hour clock, e. g., "at or about 2300 hours." These phrases are to be construed reasonably in the light of the circumstances of each particular case. When the act (or acts) specified extends over a considerable period of time it is proper to allege it (or them) as having occurred, for example, "from about 15 June 1951 to about 4 November 1951." So, also, it is proper to allege that an offense was committed while "enroute" between certain points.

8. **Form of specification in joint offense.**—In the case of a joint offense (26*d*) each accused may be charged separately as if he alone was concerned or all may be charged jointly, that is, in a single specification, in accordance with the principles of the following examples, depending on the decision of the person preferring the charges as to how the persons concerned should be tried. If A and B are joint perpetrators of an offense and it is intended to charge and try both at the same trial, they should be charged in a single specification as follows:

> "In that (A) and (B), acting jointly and in pursuance of a common intent, did (here allege place, time, and offense)."

If it is intended that B shall be tried alone, he may be charged in the same manner as if he had committed the offense by himself. However, if it is desirable to show in the specification that A was a joint actor with him, even though A is not to be tried with B, B might be charged as follows:

> "In that (B) did, in conjunction with (A), (here allege place, time, and offense)."

Note that when several persons are to be tried in a common trial, as distinguished from a joint trial, each is charged separately on individual charge sheets (26*d*; 33*l*).

9. Principals.—When a person has not himself directly committed an offense, but is liable for its commission as a principal under Article 77, he may be charged as though he himself had committed the acts which constitute the offense.

10. Person against whom offense committed.—In the case of an offense against the person or property of an individual, the first name and surname of such individual should be stated, if known. Military rank or grade should be alleged if important to the offense, as in an allegation of disobedience of the command of a superior officer; or if the individual has no military position, it may otherwise be necessary to allege his status, as in an allegation of using provoking words towards a person subject to the code (see Art. 117). Address, station, or military organization of the person against whom the offense was committed need not ordinarily be alleged.

If the name of the individual against whom the offense was committed is not known, he may be described as "a person whose name is unknown."

11. Value.—When the value of property is material with respect to the amount of punishment which may be adjudged upon conviction of an offense, such value should be alleged, for in such a case a punishment greater than the minimum may not be adjudged unless there is an allegation, as well as proof, of a value which will support the punishment. See, for a discussion of value, 200*a* (Larceny). If several articles of different kinds are the subject of the offense, the value of each article should be stated, followed by a statement of the aggregate value. An example of proper pleading in this respect would be that the accused stole "one shirt, value $———; one pair of shoes, value $———; and one blanket, value $———; of a total value of $———." The value of an article should be stated as "value $2.08" if known exactly, e. g., per government price list; or "value of about $5.00" if not so exactly known, as in the case of used items of civilian property.

12. Law of war.—In the case of a person subject to trial by general court-martial by the law of war (see Art. 18), the Charge should be: "Violation of the Law of War"; or "Violation of ———, ————," referring to the local penal law of the occupied territory. See 14. However, the erroneous designation of an article of the Uniform Code of Military Justice in such a case does not affect the jurisdiction of the court.

b. SPECIMEN CHARGES.

Charge I: Violation of the Uniform Code of Military Justice, Article 83.

Specification: In that Private Richard Roe, U. S. Army, Company A, 2d Infantry, alias Private John Doe, U. S. Army, Company F, 29th Infantry, did, under the name of John Doe, at Fort Jay, New York, on or about 24 October 1951, by means of deliberate concealment of the fact that he was then a private in said Company A, 2d Infantry, procure himself to be enlisted as a private in the Army and did thereafter, at Fort Jay, New York, receive allowances under the enlistment so procured.

Charge II: Violation of the Uniform Code of Military Justice, Article 85.

Specification: In that Private Richard Roe, U. S. Army, Company A, 2d Infantry, alias Private John Doe, U. S. Army, Company F, 29th Infantry, did, on or about 6 June 1951, without proper authority and with intent to remain away therefrom permanently, absent himself from his organization, to wit: Company A, 2d Infantry, and did remain so absent in desertion until he was apprehended on or about 4 November 1951.

Charge III: Violation of the Uniform Code of Military Justice, Article 134.

Specification 1: In that Private Richard Roe, U. S. Army, Company A, 2d Infantry, alias Private John Doe, U. S. Army, Company F, 29th Infantry, was, at Chicago, Illinois, on or about 5 June 1951, drunk and disorderly in uniform in a public place, to wit: Joe's Tavern, located at 935 Blank Street in said city.

Specification 2: In that Private Richard Roe, U. S. Army, Company A, 2d Infantry, alias Private John Doe, U. S. Army, Company F, 29th Infantry, did, at Fort Sheridan, Illinois, on or about 5 June 1951, wrongfully and willfully discharge a firearm, to wit: a carbine, in the day room of Company A, 2d Infantry, under circumstances such as to endanger human life.

c. FORMS FOR SPECIFICATIONS.

ARTICLE 78

Accessory after the fact

1. In that ———, knowing that (at) (on board) ———, on or about ——— 19—, ——— had committed an offense punishable by the Uniform Code of Military Justice, to wit: ———, did, (at) (on board) ———, on or about ——— 19—, in order to (hinder) (prevent) the (apprehension) (trial) (punishment) of the said ———, (receive) (comfort) (assist) the said ——— by ———.

ARTICLE 80

Attempts

2. In that ——— did, (at) (on board) ———, on or about ——— 19—, attempt to (escape from lawful confinement in ———) (steal ———, of a value of about $———, the property of ———) (———).

ARTICLE 81

Conspiracy

3. In that ——— did, (at) (on board) ———, on or about ——— 19—, conspire with ——— (and ———) to commit an offense under the Uniform Code of Military Justice, to wit: (larceny of ———, of a value of about $———, the property of ———) (———), and in order to effect the object of the conspiracy the said ——— (and ———) did ———.

ARTICLE 82

Solicitation, etc.

4. In that ——— did, (at) (on board) ———, on or about ——— 19—, by (here state the manner and form of solicitation or advice), (solicit) (advise) ——— (and ———) to (desert in violation of Article 85) (mutiny in violation of Article 94),* [and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about ——— 19—, (at) (on board) ———, (attempted) (committed) by ——— (and ———)].

*If the offense solicited or advised is not attempted or committed, omit the words contained in brackets.

5. In that ——— did, (at) (on board) ———, on or about ——— 19—, by (here state the manner and form of solicitation or advice), (solicit) (advise) ——— (and ———) to commit (an act of misbehavior before the enemy in violation of Article 99) (sedition in violation of Article 94), *[and, as a result of such

(solicitation) (advice), the offense (solicited) (advised) was, on or about ——— 19—, (at) (on board) ———, committed by ——— (and ———)].

*If the offense solicited or advised is not committed, omit the words contained in brackets.

ARTICLE 83

Fraudulent enlistment or appointment

6. In that ——— did, (at) (on board) ———, on or about ——— 19—, by means of [knowingly false representations that (here state the fact or facts material to qualification for enlistment or appointment which were represented), when in fact (here state the true fact or facts)] [deliberate concealment of the fact that (here state the fact or facts disqualifying the accused for enlistment or appointment which were concealed)], procure himself to be (enlisted as a ———) (appointed as a ———) in the (here state the armed force in which the accused procured the enlistment or appointment), and did thereafter, (at) (on board) ———, receive (pay) (allowances) (pay and allowances) under the (enlistment) (appointment) so procured.

Fraudulent separation

7. In that ——— did, (at) (on board) ———, on or about ——— 19—, by means of [knowingly false representations that (here state the fact or facts material to eligibility for separation which were represented), when in fact (here state the true fact or facts)] [deliberate concealment of the fact that (here state the fact or facts concealed which made the accused ineligible for separation)], procure himself to be separated from the (here state the armed force from which the accused procured his separation).

ARTICLE 84

Effecting unlawful enlistment, etc.

8. In that ——— did, (at) (on board) ———, on or about ——— 19—, effect [the (enlistment) (appointment) of ——— as a ——— in (here state the armed force in which the person was enlisted or appointed)] [the separation of ——— from (here state the armed force from which the person was separated)], then well knowing that the said ——— was ineligible for such (enlistment) (appointment) (separation) because (here state facts whereby the enlistment, appointment, or separation was prohibited by law, regulation, or order).

ARTICLE 85

Desertion with intent to remain away permanently

9. In that ——— did, on or about ——— 19—, without proper authority and with intent to remain away therefrom permanently, absent himself from his [organization, to wit: ———] [(place of service) (place of duty), to wit: ———, located at (———) (APO ———)], and did remain so absent in desertion until (he was apprehended) on or about ——— 19—.

Desertion with intent to avoid hazardous duty, etc.

10. In that ——— did, on or about ——— 19—, with intent to (avoid hazardous duty) (shirk important service), namely: ———, quit his (unit) (organization) (place of duty), to wit: ———, located at (———) (APO ———), and did remain so absent in desertion until on or about ——— 19—.

Desertion by reenlistment, etc.

11. In that ———, without being regularly separated from the (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard), did, (at) (on board) ———, on or about ——— 19—, [(enlist) (accept an appointment) as a ——— in the (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard) without fully disclosing the fact that he had not been so regularly separated] [enter a foreign armed service, to wit: ———, not being authorized to do so by the United States], and did remain so absent in desertion with respect to his former (enlistment) (appointment) until (he was apprehended) on or about ——— 19—.

Desertion prior to acceptance of resignation

12. In that ———, having tendered his resignation and prior to due notice of the acceptance of the same, did, on or about ——— 19—, without leave and with intent to remain away therefrom permanently, quit his (post) (proper duties), to wit: ———, and did remain so absent in desertion until (he was apprehended) on or about ——— 19—.

Attempted desertion

13. In that ——— did, (at) (on board) ———, on or about ——— 19—, attempt to (absent himself from his place of service, to wit: ———, without proper authority and with intent to remain away therefrom permanently) (———).

ARTICLE 86

Failing to go to or leaving place of duty

14. In that ——— did, (at) (on board) ———, on or about ——— 19—, without proper authority, (fail to go at the time prescribed to) (go from) his appointed place of duty, to wit: (here set forth the appointed place of duty).

Absence from unit, etc.

15. In that ——— did, on or about ——— 19—, without proper authority, absent himself from his (unit) (organization) (place of duty at which he was required to be), to wit: ———, located at (———) (APO ———), and did remain so absent until on or about ——— 19—.

Absence from unit, etc., with intent to avoid maneuvers

16. In that ——— did, on or about ——— 19—, without proper authority and with intent to avoid (maneuvers) (field exercises), absent himself from his (unit) (organization) (place of duty at which he was required to be), to wit: ———, located at (———) (APO ———), and did remain so absent until on or about ——— 19—.

Abandoning watch or guard

17. In that ———, being a member of the ——— (guard) (watch) (duty section), did, (at) (on board) ———, on or about ——— 19—, without proper authority, go from his (guard) (watch) (duty section) with intent to abandon the same.

ARTICLE 87

Missing movement

18. In that ——— did, (at) (on board) ———, on or about ——— 19—, through (neglect) (design) miss the movement of (Aircraft No. ———) (Flight 11) (the U. S. S. ———) (Company A, 1st Infantry) (———), with which he was required in the course of duty to move.

ARTICLE 88

Contempt toward officials

19. In that ——— did, (at) (on board) ———, on or about ——— 19—, [use (orally and publicly) (———) the following contemptuous words] [in a contemptuous manner, use (orally and publicly) (———) the following words] against the [(President) (Vice President) (Congress) (Secretary of ———)] [(Governor) (legislature) of the (State of ———) (Territory of ———) (———), a (State) (Territory) (———) in which he, the said ———, was then (on duty) (present)], to wit: "———," or words to that effect.

ARTICLE 89

Disrespect to superior officer

20. In that ——— did, (at) (on board) ———, on or about ——— 19—, behave himself with disrespect towards ———, his superior officer, by (saying to him, "———," or words to that effect) (contemptuously turning from and leaving him while he, the said ———, was talking to him, the said ———) (———).

ARTICLE 90

Striking superior officer

21. In that ——— did, (at) (on board) ———, on or about ——— 19—, strike ———, his superior officer, who was then in the execution of his office, (in) (on) the ——— with (a) (his) ———.

Drawing, etc., weapon against superior officer

22. In that ——— did, (at) (on board) ———, on or about ——— 19—, (draw) (lift up) a weapon, to wit: a ———, against ———, his superior officer, who was then in the execution of his office.

Offering violence to superior officer

23. In that ——— did, (at) (on board) ———, on or about ——— 19—, offer violence against ———, his superior officer, who was then in the execution of his office, in that he, the said ———, did ———.

Willful disobedience of superior officer

24. In that ———, having received a lawful command from ———, his superior officer, to ———, did, (at) (on board) ———, on or about ——— 19—, willfully disobey the same.

ARTICLE 91

Assault on warrant, noncommissioned, or petty officer

25. In that ——— did, (at) (on board) ———, on or about ——— 19—, (strike) (assault) ———, his superior ——— officer, who was then in the execution of his office, by ——— him (in) (on) (the ———) with (a) (his) ———.

Willful disobedience of warrant, noncommissioned, or petty officer

26. In that ———, having received a lawful order from ———, his superior ——— officer, to ———, did, (at) (on board) ———, on or about ——— 19—, willfully disobey the same.

Contempt, etc., toward warrant, noncommissioned, or petty officer

27. In that ———, (at) (on board) ———, on or about ——— 19—, [did treat with contempt] [was disrespectful in (language) (deportment) toward] ———, his superior ——— officer, who was then in the execution of his office, by (saying to him, "——— ——— ———," or words to that effect) (spitting at his feet) (———).

ARTICLE 92

Violating general order or regulation

28. In that ——— did, (at) (on board) ———, on or about ——— 19—, (violate) (fail to obey) a lawful general (order) (regulation), to wit: [paragraph ———, (Army) (Air Force) Regulation———, dated ——— 19—] [General Order No. ———, U. S. Navy, dated ——— 19—] [———], by ———.

Failure to obey lawful order

29. In that ———, having knowledge of a lawful order issued by ——— (to submit to certain medical treatment) (to ———) (not to ———) (———), an order which it was his duty to obey, did, (at) (on board) ———, on or about ——— 19—, fail to obey the same.

Derelict in duty

30. In that ———, (at) (on board) ———, (on or about ——— 19—) (from about ——— 19— to about ——— 19—), was derelict in the performance of his duties in that he [negligently failed to (inspect the report of fuel on board said ship for the twenty-four hour period ending on ———) (inspect the guard) (wind and compare all chronometers on board the said ———) (perform complete motor maintenance on ——— thereby permitting the water in the radiator to become seriously low) (inspect properly the engine on Aircraft No. ——— thereby clearing it for flight with a loose sparkplug) (keep properly the accounts of ——— by neglecting to verify the monthly bank balances for comparison with cash deposited) (———), as it was his duty to do] [———].

ARTICLE 93

Cruelty toward, etc., a person subject to his orders

31. In that ———, (at) (on board) ———, on or about ——— 19—, [was cruel toward] [did (oppress) (maltreat)] ———, a person subject to his orders, by (kicking him in the stomach) (confining him for twenty-four hours without water) (———).

ARTICLE 94

Mutiny

32. In that ———, with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at) (on board) ———, on or about ——— 19—, [refuse, in concert with (———) (and) (others whose names are unknown), to (obey the orders of ——— to ———) (perform his duty as ———)] [create (violence) (a disturbance) by (attacking the officers of the said ship) (barricading himself in Barracks T–7, firing his rifle at ———, and exhorting other persons to join him in defiance of ———) (———)].

Sedition

33. In that ———, with intent to cause the (overthrow) (destruction) (overthrow and destruction) of lawful civil authority, to wit: ———, did, (at) (on board) ———, on or about ——— 19—, in concert with (———) (and) (others whose names are unknown), create (revolt) (violence) (a disturbance) against such authority by (entering the Town Hall of ——— and destroying property and records therein) (marching upon and compelling the surrender of the police of ———) (———).

Failure to suppress or report mutiny or sedition

34. In that ——— did, (at) (on board) ———, on or about ——— 19—, fail to [do his utmost to prevent and suppress a (mutiny) (sedition) among the (soldiers) (sailors) (airmen) (———) of ———, which (mutiny) (sedition) was being committed in his presence, in that (he took no means to compel the dispersal of the assembly) (he made no effort to assist ——— who was attempting to quell the mutiny) (———)] [take all reasonable means to inform ———, (his superior) (his commanding officer), of a (mutiny) (sedition) among the (soldiers) (sailors) (airmen) (———) of ———, which (mutiny) (sedition) he the said ——— (knew) (had reason to believe) was taking place].

Attempted mutiny

35. In that ———, with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at) (on board) ———, on or about ——— 19—, attempt to [create (violence) (a disturbance) by ———] [————].

ARTICLE 95

Resisting apprehension

36. In that ——— did, (at) (on board) ———, on or about ——— 19—, resist being lawfully apprehended by ———, (an armed force policeman) (———).

Breaking arrest

37. In that ———, having been duly placed in arrest (in quarters) (in his company area) (———), did, (at) (on board) ———, on or about ——— 19—, break said arrest.

Escape from custody or confinement

38. In that ——— did, (at) (on board) ———, on or about ——— 19—, escape from (the lawful custody of ———) (lawful confinement in ———).

ARTICLE 96

Releasing prisoner without authority; suffering prisoner to escape

39. In that ——— did, (at) (on board) ———, on or about ——— 19—, [without proper authority release] [through (neglect) (design) suffer] ———, a prisoner duly committed to his charge (to escape).

ARTICLE 97

Unlawful detention

40. In that ——— did, (at) (on board) ———, on or about ——— 19—, unlawfully (apprehend ———) (place ——— in arrest) (confine ——— in ———).

ARTICLE 98

Unnecessary delay in disposing of case

41. In that ———, being charged with the duty of [(investigating) (taking immediate steps to determine the proper disposition of) charges preferred against ———, a person accused of an offense under the Uniform Code of Military Justice] [———], was, (at) (on board) ———, on or about ——— 19—, responsible for unnecessary delay in (investigating said charges) (determining the proper disposition of said charges) (———), in that he (did ———) (failed to ———) (———).

Failing to enforce or comply with code

42. In that ———, being charged with the duty of ———, did, (at) (on board) ———, on or about ——— 19—, knowingly and intentionally fail to (enforce) (comply with) Article ———, Uniform Code of Military Justice, in that he ———.

ARTICLE 99

Misbehavior before the enemy: —Running away

43. In that ——— did, (at) (on board) ———, on or about ——— 19—, (before) (in the presence of) the enemy, run away (from his company) (and hide) (———), (and did not return until after the engagement had been concluded) (———).

—Shamefully abandoning, etc., command, etc.

44. In that ——— did, (at) (on board) ———, on or about ——— 19—, (before) (in the presence of) the enemy, shamefully (abandon) (surrender) (deliver up) ———, which it was his duty to defend.

—Endangering safety of command, etc.

45. In that ——— did, (at) (on board) ———, on or about ——— 19—, (before) (in the presence of) the enemy, endanger the safety of ———, which it was his duty to defend, by (disobeying an order from ——— to engage the enemy) (neglecting his duty as a sentinel by engaging in a card game while on his post) (intentional misconduct in that he became drunk and fired flares, thus revealing the location of his unit) (———).

—Casting away arms, etc.

46. In that ——— did, (at) (on board) ———, on or about ——— 19—, (before) (in the presence of) the enemy, cast away his (rifle) (ammunition) (———).

—Cowardly conduct

47. In that ———, (at) (on board) ———, on or about ——— 19—, (before) (in the presence of) the enemy, was guilty of cowardly conduct, in that ———.

—Quiting place of duty to plunder or pillage

48. In that ——— did, (at) (on board) ———, on or about ——— 19—, (before) (in the presence of) the enemy, quit his place of duty for the purpose of (plundering) (pillaging) (plundering and pillaging).

—Causing false alarm

49. In that ——— did, (at) (on board) ———, on or about ——— 19—, (before) (in the presence of) the enemy, cause a false alarm in (Fort ———) (the said ship) (the camp) (———) by [needlessly and without authority (causing the call to arms to be sounded) (sounding the general alarm)] [———].

—Failing to do utmost to encounter, etc., enemy troops, etc.

50. In that ———, being (before) (in the presence of) the enemy, did, (at) (on board) ———, on or about ——— 19—, by (ordering his own troops to halt their advance) (———), willfully fail to do his utmost to (encounter) (engage) (capture) (destroy), as it was his duty to do, (certain enemy troops which were in retreat) (———).

—Failing to afford relief

51. In that ——— did, (at) (on board) ———, on or about ——— 19—, (before) (in the presence of) the enemy, fail to afford all practicable relief and assistance to (the U. S. S. ———, which was engaged in battle and had run aground, in that he failed to take her in tow) (certain troops of the ground forces of ———, which were engaged in battle and were pinned down by enemy fire, in that he failed to furnish air cover) (———) as he properly should have done.

ARTICLE 100

Compelling surrender, striking colors, etc.

52. In that ——— did, (at) (on board) ———, on or about ——— 19—, [(compel) (attempt to compel) ———, the commander of ———, (to give it up to the enemy) (to abandon

said ———), by ———] [without proper authority, strike the (colors) (flag) to the enemy].

ARTICLE 101

Improper use of countersign

53. In that ——— did, (at) (on board) ———, on or about ——— 19—, disclose the (parole) (countersign), to wit: ———, to ———, a person who was not entitled to receive it.

54. In that ——— did, (at) (on board) ———, on or about ——— 19—, give to ———, a person entitled to receive and use the (parole) (countersign), a (parole) (countersign), namely: ———, which was different from that which, to his knowledge, he was authorized and required to give, to wit: ———.

ARTICLE 102

Forcing a safeguard

55. In that ——— did, (at) (on board) ———, on or about ——— 19—, force a safeguard [, known by him to have been placed over the premises occupied by ——— at ———, by (overwhelming the guard posted for the protection of the same) (———)] [———].

ARTICLE 103

Failing to secure public property taken from enemy

56. In that ——— did, (at) (on board) ———, on or about ———19—, fail to secure for the service of the United States certain public property taken from the enemy, to wit: ———, of a value of about $———.

Captured or abandoned property

57. In that ——— did, (at) (on board) ———, on or about ——— 19—, fail to give notice and turn over to proper authority without delay certain (captured) (abandoned) property which had come into his (possession) (custody) (control), to wit: ———, of a value of about $———.

—Dealing in

58. In that ——— did, (at) (on board) ———, on or about ——— 19—, (buy) (sell) (trade in) (deal in) (dispose of) (———) certain (captured) (abandoned) property, to wit: ———, of a value of about $———, thereby (receiving) (expecting) a (profit) (benefit) (advantage) to (himself) (———, his accomplice) (———, his brother) (———).

Looting, etc.

59. In that ——— did, (at) (on board) ———, on or about ——— 19—, engage in (looting) (pillaging) (looting and pillaging) by unlawfully (seizing) (appropriating) ———, [property which had been left behind] [the property of ———, (an inhabitant of ———) (———)].

ARTICLE 104

Aiding the enemy

60. In that ——— did, (at) (on board) ———, on or about ——— 19—, (aid) (attempt to aid) the enemy with (arms) (ammunition) (supplies) (money) (———), (by furnishing and delivering to ———, members of the enemy's armed forces, ———) (———).

61. In that ——— did, (at) (on board) ———, on or about ——— 19—, without proper authority, knowingly [(harbor) (protect) ———, an enemy, by (concealing the said ——— in his house) (———)] [(give intelligence to) (communicate with)

(correspond with) (hold intercourse with) the enemy (by informing a patrol of the enemy's forces of the whereabouts of a military patrol of the United States forces) (by writing and transmitting secretly through the lines to one ———, whom he the said ——— knew to be an officer of the enemy's armed forces, a communication in words and figures substantially as follows, to wit: ———) (indirectly by publishing in ———, a newspaper published at ———, a communication in words and figures as follows, to wit: ———, which communication was intended to reach the enemy) (———)].

ARTICLE 105

Misconduct as prisoner

62. In that ———, while in the hands of the enemy, did, (at) (on board) ———, on or about ——— 19—, without proper authority and for the purpose of securing favorable treatment by his captors, (report to the commander of Camp ——— the preparations by ———, a prisoner at said camp, to escape, as a result of which report the said ——— was placed in solitary confinement) (———).

Maltreatment of prisoner

63. In that ——— did, (at) (on board) ———, on or about ——— 19—, while in the hands of the enemy and in a position of authority over ———, a prisoner at ———, as (officer in charge of prisoners at ———) (———), (deprive the said ——— of ———) (———) without justifiable cause.

ARTICLE 106

Spying

64. In that ——— was, (at) (on board) ———, on or about ——— 19—, found (lurking) (acting) as a spy in and about ———, [a (fortification) (post) (base) (vessel) (aircraft) (———) within the control and jurisdiction of an armed force of the United States, to wit: ———] [a (shipyard) (manufacturing plant) (———) engaged in work in aid of the prosecution of the war by the United States] [———], for the purpose of (collecting) (attempting to collect) information in regard to the [(numbers) (resources) (operations) (———) of the armed forces of the United States] [(military production) (———) of the United States] [———], with intent to impart the same to the enemy.

ARTICLE 107

Signing false official document; making false official statement

65. In that ——— did, (at) (on board) ———, on or about ——— 19—, with intent to deceive, [sign an official (record) (return) (———), to wit: ———] [make to ——— an official statement, to wit: ———], which (record) (return) (statement) (———) was (wholly false) (false in that ———), and was then known by the said ——— to be so false.

ARTICLE 108

Selling, etc., military property

66. In that ——— did, (at) (on board) ———, on or about ——— 19—, without proper authority, (sell to ———) (dispose of by ———) ———, of a value of about $———, military property of the United States.

67. In that ——— did, (at) (on board) ———, on or about ——— 19—, without proper authority, (willfully) (through neglect) (damage by ———) (destroy by ———) (lose) ———, of a value of about $———, military property of the United States, *(the amount of said damage being in the sum of about $———).

Damaging, etc., military property

68. In that ——— did, (at) (on board) ———, on or about ——— 19—, without proper authority, (willfully) (through neglect) suffer ———, of a value of about $———, military property of the United States, to be (lost) (damaged by ———) (destroyed by ———) (sold to ———) (wrongfully disposed of by ———), *(the amount of said damage being in the sum of about $———).

Suffering to be lost, etc., military property

*This allegation should be used when damage is alleged.

ARTICLE 109

69. In that ——— did, (at) (on board) ———, on or about ——— 19—, [(willfully) (recklessly) waste] [(willfully) (recklessly) spoil] [willfully and wrongfully (destroy) (damage) by ———] ———, of a value of about $———, the property of ———, *(the amount of said damage being in the sum of about $———).

Waste, etc., of non-military property

*This allegation should be used when damage is alleged.

ARTICLE 110

70. In that ———, on ——— 19—, while serving in command of the ———, making entrance to Boston Harbor, did negligently hazard the said vessel by failing and neglecting to maintain or cause to be maintained an accurate running plot of the true position of said vessel while making said approach, as a result of which neglect the said ———, at or about ——— hours on the day aforesaid, became stranded in the vicinity of Channel Buoy Number Three.

Hazarding of vessel

71. In that ———, on ——— 19—, while serving as navigator of the U. S. S. ———, cruising on special service in the ——— Ocean off the coast of ———, notwithstanding the fact that at about midnight, ——— 19—, the northeast point of ——— Island bore abeam and was about six miles distant, the said ship being then under way and making a speed of about ten knots, and well knowing the position of the said ship at the time stated, and that the charts of the locality were unreliable and the currents thereabouts uncertain, did then and there negligently hazard the said vessel by failing and neglecting to exercise proper care and attention in navigating said ship while approaching ——— Island, in that he neglected and failed to lay a course that would carry said ship clear of the last aforesaid island, and to change the course in due time to avoid disaster; and the said ship, as a result of said negligence on the part of said ———, ran upon a rock off the southwest coast of ——— Island, at about ——— hours, ——— 19—, in consequence of which the said U. S. S. ——— was lost.

72. In that ———, on ——— 19—, while serving as navigator of the U. S. S. ——— and well knowing that at about sunset of said day the said ship had nearly run her estimated distance from the ——— position, obtained and plotted by him, to the position of ———, and well knowing the difficulty of sighting ——— from a safe distance after sunset, did then and there negligently hazard the said vessel by failing and neglecting to advise his commanding officer to lay a safe course for said ship to the northward before continuing on a westerly course, as it was the duty of the said ——— to do; in consequence of which the said ship was, at about ——— hours on the day above mentioned, run upon ——— Bank in the ——— Sea, about latitude ——— degrees, ——— minutes, north, and longitude ——— degrees, ——— minutes, west, and seriously injured.

Suffering a vessel to be hazarded

73. In that ———, while serving as combat intelligence center officer on board the ———, making passage from Boston to Philadelphia, and having, between ——— and ——— hours on ——— 19—, been duly informed of decreasing radar ranges and constant radar bearings indicating that the said ——— was upon a collision course approaching a radar target, did then and there negligently suffer the said vessel to be hazarded by failing and neglecting to report said collision course with said radar target to the officer of the deck, as it was his duty to do, and he the said ———, through said negligence, did cause the said ——— to collide with the ——— at or about ——— hours on said date, with resultant damage to both vessels.

ARTICLE 111

Drunken or reckless operation of vehicle

74. In that ——— did, (at) (on board) ———, on or about ——— 19—, (in the motor pool area) (near the Officers' Club) (on ——— Street between ——— and ——— Avenues) (———) operate a vehicle, to wit: (a truck) (a passenger car) (———), [while drunk] [in a (reckless) (wanton) manner by (attempting to pass another vehicle on a sharp curve) (driving at a speed in excess of 50 miles per hour on the sidewalk and wrong side of said street) (———)] (and did thereby cause said vehicle to strike and injure ———).

ARTICLE 112

Drunk on duty

75. In that ——— was, (at) (on board) ———, on or about ——— 19—, found drunk while on duty as ———.

ARTICLE 113

Misbehavior of sentinel or lookout

76. In that ———, on or about ——— 19—, (at) (on board) ———, being (posted) (on post) as a (sentinel) (lookout) (at Warehouse No. 7) (on Post No. 11) (for radar observation) (———) [was found (drunk) (sleeping) upon his post] [did leave his post before he was regularly relieved].

ARTICLE 114

Dueling, etc.

77. In that ——— (and ———) did, (at) (on board) ———, on or about ——— 19—, fight a duel (with ———), using as weapons therefor (pistols) (swords) (———).

78. In that ——— did, (at) (on board) ———, on or about ——— 19—, promote a duel between ——— and ——— by (telling said ——— he would be a coward if he failed to challenge said ——— to a duel) (knowingly carrying from said ——— to said ——— a challenge to fight a duel).

79. In that ———, being officer of the (day) (deck) (at) (on board) ——— and having knowledge that ——— and ——— intended and were about to engage in a duel near ———, did, (at) (on board) ———, on or about ——— 19—, connive at the fighting of said duel by knowingly permitting ———, one of the parties to said proposed duel, to leave ——— and go toward the place appointed for said duel at the time which he, ———, then knew had been appointed therefor.

80. In that ———, having knowledge that a challenge to fight a duel (had been sent) (was about to be sent) by ——— to ———, did, (at) (on board) ———, on or about ——— 19—, fail to report that fact promptly to the proper authority.

ARTICLE 115

Malingering; self-inflicted injury

81. In that ——— did, (at) (on board) ———, (on or about ——— 19—) (from about ——— 19— to about ——— 19—), for the purpose of avoiding (his duty as officer of the day) (his duty as aircraft mechanic) (work in the mess hall) (service as an enlisted person) (———) [feign (a headache) (a sore back) (illness) (mental lapse) (mental derangement) (———)] [intentionally injure himself by ———].

ARTICLE 116

Riot

82. In that ——— did, (at) (on board) ———, on or about ——— 19—, (cause) (participate in) a riot by unlawfully assembling with (——— and ———) (and) (others to the number of about ——— whose names are unknown) for the purpose of (resisting the police of ———) (assaulting passers-by) (———), and in furtherance of such purpose did (fight with said police) (assault certain women, to wit: ———) (———).

Breach of the peace

83. In that ——— did, (at) (on board) ———, on or about ——— 19—, (cause) (participate in) a breach of the peace by [wrongfully engaging in a fist fight in the dayroom with ———] [using the following (profane) (indecent) (———) language (foward ———), to wit: "———", or words to that effect] [wrongfully shouting and singing in a public place, to wit: ———] [———].

ARTICLE 117

Provoking speeches or gestures

84. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully use (provoking) (reproachful) (words, to wit: "———", or words to that effect) (and) (gestures, to wit:

———) towards (Sergeant ———, U. S. Air Force) (Harold Brown, a person serving with the Army of the United States in the field) (———, captain, U. S. Navy).

ARTICLE 118

Murder

85. In that ——— did, (at) (on board) ———, on or about ——— 19—, [with premeditation] [while (perpetrating) (attempting to perpetrate) ———], murder ——— by means of (shooting him with a rifle) (pushing him over a cliff) (running into him with an automobile) (———).

NOTE.—In charging murder under sections (2) and (3) of Article 118, all material inclosed in brackets is omitted.

ARTICLE 119

Voluntary manslaughter

86. In that ——— did, (at) (on board) ———, on or about ——— 19—, willfully and unlawfully kill ——— by ——— him (in) (on) the ——— with a ———.

Involuntary manslaughter

87. In that ——— did, (at) (on board) ———, on or about ——— 19—, [by culpable negligence] [while (perpetrating) (attempting to perpetrate) an offense directly affecting the person of ———, to wit: (maiming) (a battery) (———)] unlawfully kill ——— by ——— him (in) (on) the ——— with a ———.

ARTICLE 120

Rape and carnal knowledge

88. In that ——— did, (at) (on board) ———, on or about ——— 19—, (rape) (commit the offense of carnal knowledge with) ———.

ARTICLE 121

Larceny

89. In that ——— did, (at) (on board) ———, on or about ——— 19—, steal ———, of a value of about $———, the property of ———.

Wrongful appropriation

90. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully appropriate ———, of a value of about $———, the property of ———.

ARTICLE 122

Robbery

91. In that ——— did, (at) (on board) ———, on or about ——— 19—, by means of (force and violence) (and) (putting him in fear) steal from the (person) (presence) of ———, against his will, (a watch) (———), of a value of about $———, the property of ———.

ARTICLE 123

Forgery

92. In that ——— did, (at) (on board) ———, on or about ——— 19—, with intent to defraud, falsely [make (in its entirety) (the signature of ——— to) (———) a certain (check) (writing) (———) in the following words and figures, to wit: ———] [alter a certain (check) (writing) (———) in the following words and figures, to wit: ———, by (adding thereto ———) (———)],

which said (check) (writing) (———) would, if genuine, apparently operate to the legal prejudice of another.

93. In that ——— did, (at) (on board) ———, on or about ——— 19—, with intent to defraud, (utter) (offer) (issue) (transfer) a certain (check) (writing) (———) in the following words and figures, to wit: ———, a writing which would, if genuine, apparently operate to the legal prejudice of another, [which said (check) (writing) (———)] [the signature to which said (check) (writing) (———)] [———] was, as he, the said ———, then well knew, falsely (made) (altered).

ARTICLE 124

Maiming

94. In that ——— did, (at) (on board) ———, on or about ——— 19—, maim ——— by (crushing his foot with a sledge hammer) (———).

ARTICLE 125

Sodomy

95. In that ——— did, (at) (on board) ———, on or about ——— 19—, commit sodomy with ———.

ARTICLE 126

Aggravated arson

96. In that ——— did, (at) (on board) ———, on or about ——— 19—, willfully and maliciously (burn) (set on fire) [an inhabited dwelling, to wit: (the residence of ———) (———, the property of ———)] [, knowing that a human being was therein at the time, (the Post Theater) (———, the property of ———)], of a value of about $———.

Simple arson

97. In that ——— did, (at) (on board) ———, on or about ——— 19—, willfully and maliciously (burn) (set fire to) (an automobile) (———), the property of ———, of a value of about $———.

ARTICLE 127

Extortion

98. In that ——— did, (at) (on board) ———, on or about ——— 19—, with intent unlawfully to obtain ($100) (———), communicate to ——— a threat to (kidnap his son, ———) (accuse ——— of having committed sodomy) (———).

ARTICLE 128

Assault

99. In that ——— did, (at) (on board) ———, on or about ——— 19—, assault ——— by (striking at him with a ———) (———).

Assault (consummated by a battery)

100. In that ——— did, (at) (on board) ———, on or about ——— 19—, unlawfully (strike) (———) ——— (on) (in) the ——— with ———.

Assault, aggravated:
—With a dangerous weapon, means, or force

101. In that ——— did, (at) (on board) ———, on or about ——— 19—, commit an assault upon ——— by (shooting) (striking) (cutting) (———) (at him) (him) (in) (on) (the———) with [a dangerous weapon] [a (means) (force) likely to produce grievous bodily harm], to wit: a (pistol) (pickax) (bayonet) (club) (———).

—Inflicting grievous bodily harm

102. In that ——— did, (at) (on board) ———, on or about ——— 19—, commit an assault upon ——— by (shooting) (striking) (cutting) (———) (him) (in) (on) the ——— with a (club) (rock) (brick) (———) and did thereby intentionally inflict grievous bodily harm upon him, to wit: a (broken leg) (deep cut) (fractured skull) (———).

ARTICLE 129

Burglary

103. In that ——— did, at ———, on or about ——— 19—, in the nighttime, burglariously break and enter the (dwelling house) (——— within the curtilage) of ———, with intent to commit (murder) (larceny) (———) therein.

ARTICLE 130

Housebreaking

104. In that ——— did, (at) (on board) ———, on or about ——— 19—, unlawfully enter the (dwelling) (room) (bank) (store) (warehouse) (shop) (tent) (stateroom) (———) of ———, with intent to commit a criminal offense, to wit: ———, therein.

ARTICLE 131

Perjury

105. In that ———, having taken a lawful (oath) (affirmation) in a (trial by ——— court-martial of ———) (trial by a court of competent jurisdiction, to wit: ———, of ———) (deposition for use in a trial by ——— of ———) (———) that he would (testify) (depose) truly, did, (at) (on board) ———, on or about ——— 19—, willfully, corruptly, and contrary to such (oath) (affirmation), (testify) (depose) in substance that ———, which (testimony) (deposition) was upon a material matter and which he did not then believe to be true.

ARTICLE 132

Making false claim

106. In that ——— did, (at) (on board) ———, on or about ——— 19—, [by preparing (a voucher) (———) for presentment to ———, an officer of the United States duly authorized to (approve) (allow) (pay) (approve, allow, and pay) such claim] [———], make a claim against the (United States) (finance officer at ———) (———) in the amount of $——— for [private property alleged to have been (lost) (destroyed) in the military service] [———], which claim was (false) (fraudulent) (false and fraudulent) in the amount of $——— in that ———, and was then known by the said ——— to be (false) (fraudulent) (false and fraudulent).

Presenting false claim

107. In that ——— did, (at) (on board) ———, on or about ——— 19—, by presenting (a voucher) (———) to ———, an officer of the United States duly authorized to (approve) (pay) (approve and pay) such claim, present for (approval) (payment) (approval and payment) a claim against the (United States) (finance officer at ———) (———) in the amount of $——— for (services alleged to have been rendered to the United States by ——— during ———) (———), which claim was (false) (fraudulent) (false and fraudulent) in the amount of

$——— in that ———, and was then known by the said ——— to be (false) (fraudulent) (false and fraudulent).

108. In that ———, for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States in the amount of $———, did, (at) (on board) ———, on or about ——— 19—, (make) (use) (make and use) a certain (writing) (paper), to wit: ———, which said (writing) (paper), as he, the said ———, then knew, contained a statement that ———, which statement was (false) (fraudulent) (false and fraudulent) in that ———, and was then known by the said ——— to be (false) (fraudulent) (false and fraudulent).

Making, etc., false writing

109. In that ———, for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did, (at) (on board) ———, on or about ——— 19—, make an oath [to the fact that ———] [to a certain (writing) (paper), to wit: ———, to the effect that ———], which said oath was false in that ———, and was then known by the said ——— to be false.

Making false oath

110. In that ———, for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did, (at) (on board) ———, on or about ——— 19—, (forge) (counterfeit) (forge and counterfeit) the signature of ——— upon a ——— in words and figures as follows: ———.

Forging, etc., signature

111. In that ———, for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did, (at) (on board) ———, on or about ——— 19—, use the signature of ——— on a certain (writing) (paper), to wit: ———, such signature being (forged) (counterfeited) (forged and counterfeited), and then known by the said ——— to be (forged) (counterfeited) (forged and counterfeited).

Using forged signature

112. In that ———, having (charge) (possession) (custody) (control) of (money) (———) of the United States, (furnished) (intended) (furnished and intended) for the armed forces thereof, did, (at) (on board) ———, on or about ——— 19—, knowingly deliver to ———, the said ——— having authority to receive the same, (an amount) (———), which, as he, ———, then knew, was ($———) (———) less than the (amount) (———) for which he received a (certificate) (receipt) from the said———.

Paying amount less than called for by receipt

113. In that ———, being authorized to (make) (deliver) (make and deliver) a paper certifying the receipt of property of the United States (furnished) (intended) (furnished and intended) for the armed forces thereof, did, (at) (on board) ———, on or about ——— 19—, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States, (make) (deliver) (make and deliver) to ——— such a writing, in words and figures as follows: ———, the property therein certified as received being of a value of about $———.

Making receipt without knowledge of the facts

ARTICLE 133

Copying, etc., examination paper

114. In that ——— did, (at) (on board) ———, on or about ——— 19—, while undergoing a written examination on the subject of ———, wrongfully and dishonorably (receive) (request) unauthorized aid by [(using) (copying) the examination paper of ———] [———].

Drunk, etc.

115. In that ——— was, (at) (on board) ———, on or about ——— 19—, in a public place, to wit: ———, (drunk) (disorderly) (drunk and disorderly) while in uniform, to the disgrace of the armed forces.

Failure, etc., to pay debt

116. In that ———, being indebted to ——— in the sum of $——— for ———, which amount became due and payable (on) (about) (on or about) ———, did, (at) (on board) ———, from ——— 19— to ——— 19—, dishonorably fail to pay said debt.

Failure to keep promise to pay debt

117. In that ———, having, on or about ——— 19—, become indebted to ——— in the sum of $——— for ———, and having failed without due cause to liquidate said indebtedness, and having, on or about ——— 19—, promised said ——— (in writing) that on or about ——— 19— he would (settle such indebtedness in full) (pay on such indebtedness the sum of $———), did, without due cause, (at) (on board) ———, on or about ——— 19—, dishonorably fail to keep said promise.

ARTICLE 134

Abusing public animal

118. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully (kick a public horse in the belly) (———).

Adultery

119. In that ——— (, a married man,) did, (at) (on board) ———, on or about ——— 19—, wrongfully have sexual intercourse with ———, (a married woman) (a woman) not his wife.

Assault:
—Indecent

120. In that ——— did, (at) (on board) ———, on or about ——— 19—, commit an indecent assault upon ——— by ———, with intent to gratify his (lust) (sexual desires).

—Upon a commissioned officer

121. In that ——— did, (at) (on board) ———, on or about ——— 19—, assault ———, a commissioned officer of [the Army of the United States] [———, a friendly foreign power] [the United States (Navy) (Marine Corps) (Air Force) (Coast Guard)], by ———.

NOTE.—That the accused did not know the commissioned officer to be such is a defense to this kind of assault—but not to an included assault in which the official position of the victim is immaterial.

—Upon a warrant, noncommissioned, or petty officer

122. In that ——— did, (at) (on board) ———, on or about ——— 19—, assault ———, a (warrant) (noncommissioned) (petty) officer of [the Army of the United States] [the United States (Navy) (Marine Corps) (Air Force) (Coast Guard)], by ———.

NOTE.—That the accused did not know the warrant, etc., officer to be such is a defense to this kind of assault—but not to an included assault in which the official position of the victim is immaterial.

—Upon a person in the execution of police duties

123. In that ——— did, (at) (on board) ———, on or about ——— 19—, assault ———, a person then having and in the execution of (air police) (military police) (shore patrol) (civil law enforcement) duties, by ———.

—With intent to commit certain offenses

124. In that ——— did, (at) (on board) ———, on or about ——— 19—, with intent to commit (murder) (voluntary manslaughter) (rape) (robbery) (sodomy) (arson) (burglary) (housebreaking), commit an assault upon ——— by ———.

Assault (consummated by a battery) upon a child under the age of 16

125. In that ——— did, (at) (on board) ———, on or about ——— 19—, unlawfully (strike) (———) ———, a child under the age of sixteen years, (in) (on) the ——— with ———.

Bigamy

126. In that ——— did, at ———, on or about ——— 19—, wrongfully and bigamously marry ———, having at the time of his said marriage to ——— a lawful wife then living, to wit: ———.

Bribery and graft:
—Asking, etc.

127. In that ———, being at the time (a contracting officer for ———) (the personnel officer of ———) (———), did, (at) (on board) ———, on or about ——— 19—, wrongfully and unlawfully (ask) (accept) (receive) from ———, (a contracting company engaged in ———) (———), (the sum of $———) (———, of a value of about $———) (———), [with intent to have his (decision) (action) influenced with respect to] [(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by him the said ——— in relation to] an official matter in which the United States was and is interested, to wit: (the purchasing of military supplies from ———) (the transfer of ——— to duty with ———) (———).

—Promising, etc.

128. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully and unlawfully (promise) (offer) (give) to ———, (his commanding officer) (the claims officer of ———) (———), (the sum of $———) (———, of a value of about $———) (———), [with intent to influence the (decision) (action) of the said ——— with respect to] [(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by the said ——— in relation to] an official matter in which the United States was and is interested, to wit: (the granting of leave to ———) (the processing of a claim against the United States in favor of ———) (———).

Check, worthless, making and uttering

129. In that ——— did, (at) (on board) ———, on or about ——— 19—, [with intent to deceive, wrongfully and unlawfully] make and utter to ——— a certain check, in words and figures as follows, to wit: ———, (in payment of a debt in the amount of $———) (for ———) [, he, the said ———, then not intending to have sufficient funds in the ——— bank available to meet payment of said check upon its presentment for payment in due course], and did thereafter wrongfully and dishonorably fail to (place) (maintain) sufficient funds in (the ———) (said) bank for payment of such check upon its presentment for payment.

Note.—Both allegations inclosed in brackets should be used in a case in which the accused had given the check in purported payment of a debt not intending to have sufficient funds in the bank available to meet payment upon presentment in due course, but had not thereby obtained any money, personal property, or article of value. Obtaining money, personal property, or an article of value by means of giving a check, without intending to have sufficient funds in the bank available to meet payment upon presentment in due course, may be charged as larceny or wrongful appropriation, as the case may be, in violation of Article 121 (see 200). Without the material in brackets, this specification may be used to denounce merely a wrongful and dishonorable failure to place or maintain sufficient funds in the bank for payment of the check.

Debt, failing to pay

130. In that ———, being indebted to ——— in the sum of $——— for ———, which amount became due and payable (on) (about) (on or about) ———, did, (at) (on board) ———, from ——— 19— to ——— 19—, wrongfully and dishonorably fail to pay said debt.

Disloyal statements

131. In that ——— did, (at) (on board) ———, on or about ——— 19—, with design to [promote (disloyalty) (disaffection) (disloyalty and disaffection) among (the troops) (the civilian populace) (the troops and the civilian populace)] [———], publicly utter the following statement, to wit: "———", or words to that effect, which statement was disloyal to the United States.

Disorderly, drunkenness, etc.:
—In command, quarters, etc., or under service discrediting circumstances

132. In that ——— was, (at) (on board) ———, on or about ——— 19—, (drunk) (disorderly) (drunk and disorderly) [in (command) (quarters) (station) (camp) (———)] [on board ship] [in uniform in a public place, to wit: ———] [———].

—Drinking liquor with prisoner

133. In that ———, a (sentinel) (———) in charge of prisoners, did, (at) (on board) ———, on or about ——— 19—, unlawfully drink intoxicating liquor with ———, a prisoner under his charge.

—Drunk, prisoner found

134. In that ———, a prisoner, was, (at) (on board) ———, on or about ——— 19—, found drunk.

—Incapacitating oneself for performance of duties through prior indulgence in intoxicating liquors

135. In that ——— was, (at) (on board) ———, on or about ——— 19—, as a result of previous indulgence in intoxicating liquor, incapacitated for the proper performance of his duties.

Drugs, habit forming, or marihuana:
—Wrongful possession

136. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully have in his possession ——— ounces, more or less, of (a habit forming narcotic drug, to wit: ———) (marihuana).

—Wrongful use

137. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully use (a habit forming narcotic drug, to wit: ———) (marihuana).

False or unauthorized pass, making, etc.

138. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully [and falsely (make) (forge) (alter by ———) (counterfeit) (tamper with by ———)] [sell to ———] [give to ———] [(use) (have in his possession) with intent to (defraud) (deceive)] (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (———) in words and figures as

follows: ———, [he, the said ———, then well knowing the same to be (false) (unauthorized) (———)].

False swearing

139. In that ——— did, (at) (on board) ———, on or about ——— 19—, (in an affidavit) (in his testimony before a ——— court-martial at the trial of ———) (in ———) wrongfully and unlawfully (make) (subscribe) under lawful (oath) (affirmation) a statement in substance as follows: ———, which statement he did not then believe to be true.

Firearm, discharging: —Through carelessness

140. In that ——— did, (at) (on board) ———, on or about ——— 19—, through carelessness, discharge a (service rifle) (———) in the (squadroom) (tent) (barracks) (——— compartment) (———) of ———.

—Willfully, under such circumstances as to endanger life

141. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully and willfully discharge a firearm, to wit: ———, (in the mess hall of ———) (———), under circumstances such as to endanger human life.

Fleeing scene of accident

142. In that ———, being (the driver of) (a passenger in) (the senior officer in) a vehicle at the time of (an accident) (a collision), did, at ———, on or about ——— 19—, wrongfully and unlawfully leave the scene of the (accident) (collision) without [rendering assistance to ——— who had been struck (and injured) by the said vehicle] [making his identity known].

Gambling with subordinate

143. In that (Sergeant) (———) ——— (, boatswain's mate, first class, U. S. Navy,) (, ———,) did, (at) (on board) ———, on or about ——— 19—, gamble with (Private) (———) ——— (, seaman apprentice, U. S. Navy) (, ———).

Homicide, negligent

144. In that ——— did, (at) (on board) ———, on or about ——— 19—, unlawfully kill ———, [by negligently ——— the said ——— (in) (on) the —— with a ———] [by driving a (motor vehicle) (———) against the said ——— in a negligent manner] [———].

Impersonating an officer, etc.

145. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully and unlawfully impersonate an [(officer) (warrant officer) (noncommissioned officer) (petty officer) (agent or superior authority) of the (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard)] [an official of the Government of ———] by [publicly wearing the uniform and insignia of rank of a (lieutenant of the ———) (———)] [showing the credentials of ———] [———] (with intent to defraud ——— by ———).

Indecent acts with a child

146. In that ——— did, (at) (on board) ———, on or about ——— 19—, [take (immoral) (improper) (indecent) liberties with] [commit a (lewd) (lascivious) act (upon) (with) the body of] ———, a (female) (male) under sixteen years of age, by [fondling (her) (him) and placing his hands upon (her) (his) leg and private parts] [———], with intent to (arouse) (appeal to) (gratify) the (lust) (passions) (sexual desires) of the said ——— (and ———).

Indecent exposure

147. In that ——— did, (at) (on board) ———, on or about ——— 19—, while (at a barracks window) (———) willfully and wrongfully expose in an indecent manner to public view his ———.

Indecent, insulting, or obscene language communicated by a male to a female

148. In that ——— did, (at) (on board) ———, on or about ——— 19—, (orally) (in writing) communicate to ———, a female, certain (indecent) (insulting) (obscene) language, to wit: ———.

Indecent, lewd acts with another

149. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully commit an indecent, lewd, and lascivious act with ——— by ———.

Loaning money at usurious rate

150. In that ——— (, for and in behalf of one ———,) did, (at) (on board) ———, on or about ——— 19—, loan to ——— $———, under an agreement whereby he, the said ———, was to receive for the use of said money for ——— (months) (days) [interest at the rate of ——— per cent per (annum) (month)] [the sum of $———], thereby (demanding) (receiving) (demanding and receiving) an usurious and unconscionable rate of interest for said loan.

Mail, taking, opening, etc.

151. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully and unlawfully take (a) certain [letter(s)] [postal card(s)] [package(s)], addressed to ———, [out of the (——— Post Office ———) (orderly room of ———) (unit mail box of ———) (———)] [from ———] before (it) (they) (was) (were) (delivered) (actually received) (to) (by) the person(s) to whom (it) (they) (was) (were) directed, with design to [obstruct the correspondence] [pry into the (business) (secrets)] of ———.

152. In that ——— did, (at) (on board) ———, on or about ——— 19—, [wrongfully and unlawfully (open) (secrete) (destroy)] [steal] (a) certain [letter(s)] [postal card(s)] [package(s)], addressed to ———, which said [letter(s)] [———] [(was) (were) then [in the (——— Post Office ———) (orderly room of ———) (unit mail box of ———) (custody of ———) (———)] [on the (bunk of ———) (———)]] [had previously been committed to ———, (a representative of ———,) an official agency for the transmission of communications,] before said [letter(s)] [———] (was) (were) (delivered) (actually received) (to) (by) the person(s) to whom (it) (they) (was) (were) directed.

Mails, depositing, etc., obscene matter in

153. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully and knowingly (deposit) (cause to be deposited) in the (United States) (———) mails, for mailing and delivery to ———, a (letter) (picture) (———) (containing) (portraying) (suggesting) (———) certain obscene, lewd, and lascivious matter, to wit: ———.

Misprision of felony

154. In that ———, having knowledge that ——— had actually committed a felony (at) (on board) ———, on or about ——— 19—, to wit: (the murder of ———) (———), did, from about ——— 19— to about ——— 19—, wrongfully and unlawfully conceal such felony and fail to make the same known to the civil or military authorities.

Nuisance, committing

155. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully (urinate) (defecate) (———) [on the

floor of the squadroom] [on the (deck) (bulkhead) of ———] [———].

156. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully and unlawfully [(compel) (induce) (entice) (procure)] [attempt to (compel) (induce) (entice) (procure)] ——— to engage in (acts of prostitution) (sexual intercourse for hire and reward) with persons to be directed to (him) (her) by the said ———.

Pandering

157. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully and unlawfully [receive valuable consideration, to wit: ———, on account of arranging for] [arrange for] (———) (unnamed persons) to engage in (sexual intercourse) (sodomy) with ———, (a prostitute) (———).

158. In that ———, a prisoner on parole, did, (at) (on board) ———, on or about ——— 19—, violate the conditions of his parole by ———.

Parole, violation of

159. In that ———, having taken a lawful oath [in a proceeding before (a board of officers) (a court of inquiry) concerning ———] [upon the making of an affidavit as to ———] [———], a case in which a law of the United States authorized an oath to be administered, that [he, the said ———, would (testify) (declare) (depose) (certify) truly] [a written (declaration) (deposition) (certificate) subscribed by him was true], did, (at) (on board) ———, on or about ——— 19—, willfully and contrary to such oath (state) (subscribe) a material matter, to wit: ———, which matter he did not then believe to be true.

Perjury, statutory

NOTE.—If the matter falsely stated or subscribed under lawful oath is not material, the offense should be charged as false swearing.

160. In that ——— did, (at) (on board) ———, on or about ——— 19—, procure ——— to commit perjury by inducing him, the said ———, to take a lawful (oath) (affirmation) in a (trial by ——— court-martial of ———) (trial by a court of competent jurisdiction, to wit: ———, of ———) (deposition for use in a trial by ——— of ———) (———) that he, the said ———, would (testify) (depose) (———) truly, and to (testify) (depose) (———) willfully, corruptly, and contrary to such (oath) (affirmation) in substance that ———, which (testimony) (deposition) (———) was upon a material matter and which the said ——— and the said ——— did not then believe to be true.

Perjury, subornation of

161. In that ———, (a sentinel) (overseer) (———) in charge of prisoners, did, (at) (on board) ———, on or about ——— 19—, wrongfully allow ———, a prisoner under his charge, to [(go to) (enter) (go to and enter) an unauthorized place, to wit: ———] [(hold unauthorized conversation with ———) (loiter) (neglect his task by ———) (obtain intoxicating liquor) (———)].

Prisoner, allowing to do unauthorized act

162. In that ——— did, (at) (on board) ———, on or about ——— 19—, willfully and unlawfully [(conceal) (remove) (mutilate) (obliterate) (destroy)] [appropriate with intent to (conceal) (remove) (mutilate) (obliterate) (destroy)] a public record, to wit: [the (descriptive list) (rough deck log) (quartermaster's note book) of ———] [———].

Public record, concealing, mutilating, etc.

Quarantine, medical, breaking

163. In that ———, having been duly placed in medical quarantine (in the isolation ward, ——— Hospital) (———), did, (at) (on board) ———, on or about——— 19—, break said medical quarantine.

Refusing, wrongfully, to testify

164. In that ———, being in the presence of a [(general) (special) court-martial] [duly appointed board of officers] [———] of the United States, of which ——— was (law officer) (president) (———), (and having been directed by the said——— to qualify as a witness) (and having qualified as a witness and having been directed by the said ——— to answer the following questions put to him as a witness, "———"), did, (at) (on board) ———, on or about ——— 19—, wrongfully refuse (to qualify as a witness) (to answer said questions).

Restriction, breaking

165. In that ———, having been duly restricted to the limits of ———, did, (at) (on board) ———, on or about ——— 19—, break said restriction.

Sentinel, lookout, offenses against and by

166. In that ——— did, (at) (on board) ———, on or about ——— 19—, [(attempt) (threaten) to] (unlawfully strike) (assault) ———, a (sentinel) (lookout) in the execution of his duty, [(in) (on) the ———] with (a) (his) ———.

167. In that ———, (a prisoner), did, (at) (on board) ———, on or about ——— 19—, wrongfully [use the following (threatening) (insulting) (threatening and insulting) language] [behave in an (insubordinate) (disrespectful) (insubordinate and disrespectful) manner] toward ———, a (sentinel) (lookout) in the execution of his duty, ["———," or words to that effect] [by ———].

168. In that ———, while posted as a (sentinel) (lookout), did, (at) (on board) ———, on or about ——— 19—, (loiter) (wrongfully sit down) on his post.

Stolen property, knowingly receiving

169. In that ——— did, (at) (on board) ———, on or about ——— 19—, unlawfully (receive) (buy) (conceal) ———, of a value of about $———, the property of ———, which property, as he, the said ———, then well knew, had been stolen.

Straggling

170. In that ——— did, at ———, on or about ——— 19—, while accompanying his organization on (a practice march) (maneuvers) (———), without just cause, straggle.

Threat, communicating

171. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully communicate to ——— a threat to (injure ——— by ———) (accuse ——— of having committed the offense of ———) (———).

Unclean accouterment, arms, etc.

172. In that ——— was, (at) (on board) ———, on or about ——— 19—, found with an unclean (rifle) (uniform) (———), he being at fault in failing to maintain such property in a clean condition.

Uniform, unclean, improper, appearing in

173. In that ——— did, on or about ——— 19—, wrongfully appear (at) (on board) ——— (without his ———) (in an unclean ———) (with an unclean ———) (———).

Unlawful entry

174. In that ——— did, (at) (on board) ———, on or about ——— 19—, unlawfully enter the (dwelling house) (garage) (warehouse) (tent) (vegetable garden) (orchard) (stateroom) (———) of ———.

Weapon, concealed, carrying

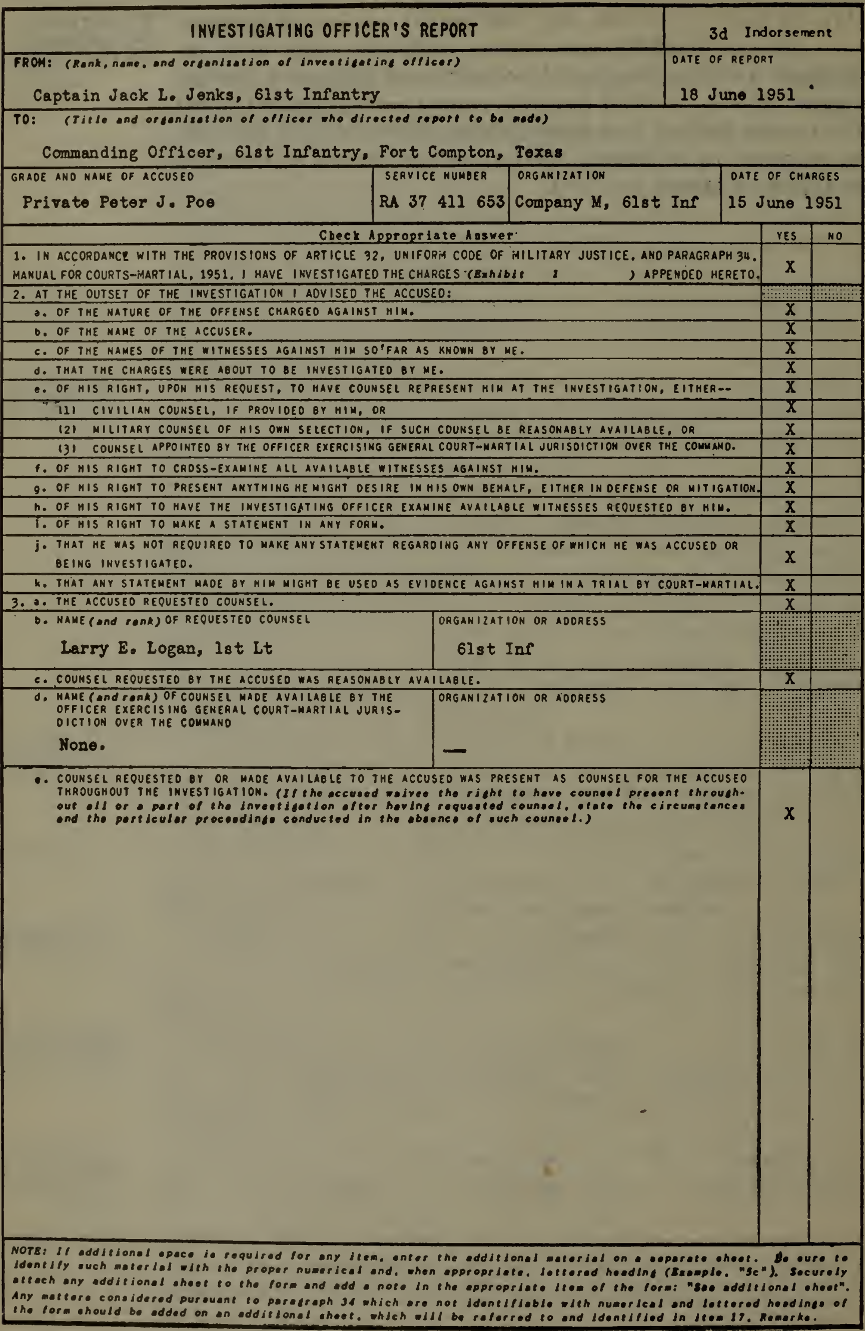
175. In that ——— did, (at) (on board) ———, on or about ——— 19—, unlawfully carry a concealed weapon, to wit: a ———.

Wearing unauthorized insignia, etc.

176. In that ——— did, (at) (on board) ———, on or about ——— 19—, wrongfully and without authority wear upon his (uniform) (civilian clothing) [the insignia of grade of a (master sergeant of ———) (chief gunner's mate of ———)] [the Combat Infantryman Badge] [the Distinguished Service Cross] [the ribbon representing the Silver Star] [the lapel button representing the Legion of Merit] [———].

Appendix 7

There is set forth below a copy of the form for the report of the investigating officer required under the provisions of Article 32. As a guide, sample entries pertaining to an accused member of the Army have been entered.



INVESTIGATING OFFICER'S REPORT	3d Indorsement
FROM: *(Rank, name, and organization of investigating officer)* Captain Jack L. Jenks, 61st Infantry	DATE OF REPORT 18 June 1951

TO: *(Title and organization of officer who directed report to be made)*
Commanding Officer, 61st Infantry, Fort Compton, Texas

GRADE AND NAME OF ACCUSED	SERVICE NUMBER	ORGANIZATION	DATE OF CHARGES
Private Peter J. Poe	RA 37 411 653	Company M, 61st Inf	15 June 1951

Check Appropriate Answer	YES	NO
1. IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 32, UNIFORM CODE OF MILITARY JUSTICE, AND PARAGRAPH 34, MANUAL FOR COURTS-MARTIAL, 1951, I HAVE INVESTIGATED THE CHARGES *(Exhibit 1)* APPENDED HERETO.	X	
2. AT THE OUTSET OF THE INVESTIGATION I ADVISED THE ACCUSED:		
a. OF THE NATURE OF THE OFFENSE CHARGED AGAINST HIM.	X	
b. OF THE NAME OF THE ACCUSER.	X	
c. OF THE NAMES OF THE WITNESSES AGAINST HIM SO FAR AS KNOWN BY ME.	X	
d. THAT THE CHARGES WERE ABOUT TO BE INVESTIGATED BY ME.	X	
e. OF HIS RIGHT, UPON HIS REQUEST, TO HAVE COUNSEL REPRESENT HIM AT THE INVESTIGATION, EITHER--	X	
(1) CIVILIAN COUNSEL, IF PROVIDED BY HIM, OR	X	
(2) MILITARY COUNSEL OF HIS OWN SELECTION, IF SUCH COUNSEL BE REASONABLY AVAILABLE, OR	X	
(3) COUNSEL APPOINTED BY THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION OVER THE COMMAND.	X	
f. OF HIS RIGHT TO CROSS-EXAMINE ALL AVAILABLE WITNESSES AGAINST HIM.	X	
g. OF HIS RIGHT TO PRESENT ANYTHING HE MIGHT DESIRE IN HIS OWN BEHALF, EITHER IN DEFENSE OR MITIGATION.	X	
h. OF HIS RIGHT TO HAVE THE INVESTIGATING OFFICER EXAMINE AVAILABLE WITNESSES REQUESTED BY HIM.	X	
i. OF HIS RIGHT TO MAKE A STATEMENT IN ANY FORM.	X	
j. THAT HE WAS NOT REQUIRED TO MAKE ANY STATEMENT REGARDING ANY OFFENSE OF WHICH HE WAS ACCUSED OR BEING INVESTIGATED.	X	
k. THAT ANY STATEMENT MADE BY HIM MIGHT BE USED AS EVIDENCE AGAINST HIM IN A TRIAL BY COURT-MARTIAL.	X	
3. a. THE ACCUSED REQUESTED COUNSEL.	X	
b. NAME *(and rank)* OF REQUESTED COUNSEL: Larry E. Logan, 1st Lt — ORGANIZATION OR ADDRESS: 61st Inf		
c. COUNSEL REQUESTED BY THE ACCUSED WAS REASONABLY AVAILABLE.	X	
d. NAME *(and rank)* OF COUNSEL MADE AVAILABLE BY THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION OVER THE COMMAND: None. — ORGANIZATION OR ADDRESS: —		
e. COUNSEL REQUESTED BY OR MADE AVAILABLE TO THE ACCUSED WAS PRESENT AS COUNSEL FOR THE ACCUSED THROUGHOUT THE INVESTIGATION. *(If the accused waives the right to have counsel present throughout all or a part of the investigation after having requested counsel, state the circumstances and the particular proceedings conducted in the absence of such counsel.)*	X	

NOTE: If additional space is required for any item, enter the additional material on a separate sheet. Be sure to identify such material with the proper numerical and, when appropriate, lettered heading (Example, "3c"). Securely attach any additional sheet to the form and add a note in the appropriate item of the form: "See additional sheet". Any matters considered pursuant to paragraph 34 which are not identifiable with numerical and lettered headings of the form should be added on an additional sheet, which will be referred to and identified in item 17, Remarks.

1

(Continued) Check Appropriate Answer	YES	NO
4. a. IN THE PRESENCE OF THE ACCUSED I HAVE EXAMINED ALL AVAILABLE WITNESSES AND DOCUMENTARY EVIDENCE ON BOTH SIDES.	X	
b. I HAVE REDUCED THE MATERIAL TESTIMONY GIVEN BY EACH SUCH WITNESS UNDER DIRECT AND CROSS-EXAMINATION TO A WRITTEN STATEMENT EMBODYING THE SUBSTANCE OF THE TESTIMONY TAKEN ON BOTH SIDES.	X	
c. THE WRITTEN STATEMENTS OF SUCH WITNESSES ARE APPENDED HERETO AS INDICATED:	X	

NAME *(and grade)* OF WITNESSES WHO WERE PRESENT	ORGANIZATION OR ADDRESS	EXHIBIT NO.		
John C. Charlie, Capt	Co M, 61st Inf	2	X	
Robert N. Sugar, Sgt	Co M, 61st Inf	3	X	

			YES	NO
5. a. THE SUBSTANCE OF THE EXPECTED TESTIMONY OF EACH OF THE FOLLOWING ABSENT WITNESSES WHOSE PRESENCE WAS NOT REQUESTED BY THE ACCUSED, OR WHO HAVING BEEN REQUESTED WERE NOT AVAILABLE, OR FOR WHOM THE REQUEST WAS WITHDRAWN *(see MCM, 1951, par. 34e(2))*, HAS BEEN REDUCED TO A WRITTEN STATEMENT WHICH IS APPENDED HERETO AS INDICATED:			X	
NAME *(and grade)* OF ABSENT WITNESSES	ORGANIZATION OR ADDRESS	EXHIBIT NO.		
Mr. William Sibley	10 Main Street, Albemarle, Texas	4	X	
b. A COPY OF EACH SUCH WRITTEN STATEMENT HAS BEEN SHOWN TO THE ACCUSED.			X	
c. IF AN ABSENT WITNESS IS REQUESTED BY THE ACCUSED BUT IS NOT AVAILABLE, ENTER A PROPER EXPLANATION.				

		YES	NO
6. THE FOLLOWING DOCUMENTS HAVE BEEN EXAMINED, SHOWN TO THE ACCUSED, AND ARE APPENDED AS INDICATED *(describe documents)*:	EXHIBIT NO.	X	
Extract copy of morning report, Co M, 61st Inf, for 1 June 1951	5		

	YES	NO
7. THE FOLLOWING DESCRIBED REAL EVIDENCE WAS EXAMINED, SHOWN TO THE ACCUSED, AND IS NOW PRESERVED FOR SAFEKEEPING AS INDICATED: One .45 caliber pistol, now in the custody of the Commanding Officer, 61st Infantry.	X	
IF CERTAIN REAL EVIDENCE WHICH WAS EXAMINED WAS NOT SHOWN TO THE ACCUSED, STATE THE REASONS.		
8. THE ACCUSED AFTER HAVING BEEN INFORMED OF HIS RIGHT TO MAKE A STATEMENT OR REMAIN SILENT:		
a. STATED THAT HE DID NOT DESIRE TO MAKE A STATEMENT.	X	
b. MADE A STATEMENT APPENDED HERETO *(Exhibit)*.		X

(Continued) Check Appropriate Answer	YES	NO
9. a. THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL RESPONSIBILITY OF THE ACCUSED AT THE TIME OF THE ALLEGED OFFENSE.		X
b. THERE WERE REASONABLE GROUNDS FOR INQUIRING INTO THE MENTAL CAPACITY OF THE ACCUSED AT THE TIME OF THE INVESTIGATION.		X
c. IF GROUNDS FOR INQUIRY AS TO ACCUSED'S MENTAL CONDITION EXIST, STATE REASONS THEREFOR AND ACTION TAKEN.	▨	▨
d. A REPORT OF A *(board of medical officers) (psychiatrist)* IS APPENDED *(Exhibit*).		X
10. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL. *(If any essential witness(es) will not be so available, list name, address, reason for nonavailability, and recommendation, if any, whether a deposition should be taken.)*	X	
11. EXPLANATORY OR EXTENUATING CIRCUMSTANCES ARE SUBMITTED HEREWITH. Possible stress of bad home conditions may have influenced his acts. The accused, during four years of military service, has never before committed an offense warranting a severe punishment. Both the company commander and the first sergeant state that he has been an excellent soldier.	X	
12. a. I HAVE INVESTIGATED AND FIND 1 PRIOR CONVICTION~~(S)~~ OF OFFENSES COMMITTED WITHIN THE THREE YEARS NEXT PRECEDING THE COMMISSION OF AN OFFENSE WITH WHICH THE ACCUSED IS NOW CHARGED *(MCM, 1951, par. 75b(2))* AND DURING--	X	
(1) A CURRENT ENLISTMENT, VOLUNTARY EXTENSION OF ENLISTMENT, APPOINTMENT, OR OTHER ENGAGEMENT OR OBLIGATION FOR SERVICE OF THE ACCUSED, OR	X	
(2) THE LAST ENLISTMENT, APPOINTMENT, OR OTHER ENGAGEMENT OR OBLIGATION FOR SERVICE OF THE ACCUSED WHICH TERMINATED UNDER OTHER THAN HONORABLE CONDITIONS OR FROM WHICH THE ACCUSED DESERTED AND SUBSEQUENTLY ENLISTED.		X
b. A COPY OF THE RECORD OF PRIOR CONVICTIONS IS APPENDED *(Exhibit* 6 *)*	X	
13. IN ARRIVING AT MY CONCLUSIONS I HAVE CONSIDERED NOT ONLY THE NATURE OF THE OFFENSE~~(S)~~ AND THE EVIDENCE IN THE CASE, BUT I HAVE LIKEWISE CONSIDERED THE AGE OF THE ACCUSED, HIS MILITARY SERVICE, AND THE ESTABLISHED POLICY THAT TRIAL BY GENERAL COURT-MARTIAL WILL BE RESORTED TO ONLY WHEN THE CHARGES CAN BE DISPOSED OF IN NO OTHER MANNER CONSISTENT WITH MILITARY DISCIPLINE.	X	
14. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM AND ARE SUPPORTED BY THE AVAILABLE EVIDENCE. *(If the answer is "NO", explain and indicate recommended action on additional sheet.)*	X	
15. ANY INCLOSURES RECEIVED BY ME WITH THE CHARGES AND NOT LISTED ABOVE AS AN EXHIBIT ARE SECURELY FASTENED TOGETHER AND APPENDED HERETO AS ONE EXHIBIT *(Exhibit*). *(If no such inclosures were received, check "NO".)*		X
16. *(Check appropriate box ONLY if trial is recommended.)* TRIAL BY ☒ GENERAL ☐ SPECIAL ☐ SUMMARY COURT-MARTIAL IS RECOMMENDED.	X	
17. REMARKS. *(Check "NO" if there are none. Check "YES" and identify the additional sheet on which they appear if there are remarks.)*		X

TYPED NAME, RANK, AND ORGANIZATION OF INVESTIGATING OFFICER	SIGNATURE
JACK L. JENKS, Capt, 61st Inf	Jack L. Jenks

3

Appendix 8

PROCEDURE FOR TRIALS BEFORE GENERAL AND SPECIAL COURTS-MARTIAL

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a. TRIAL PROCEDURE

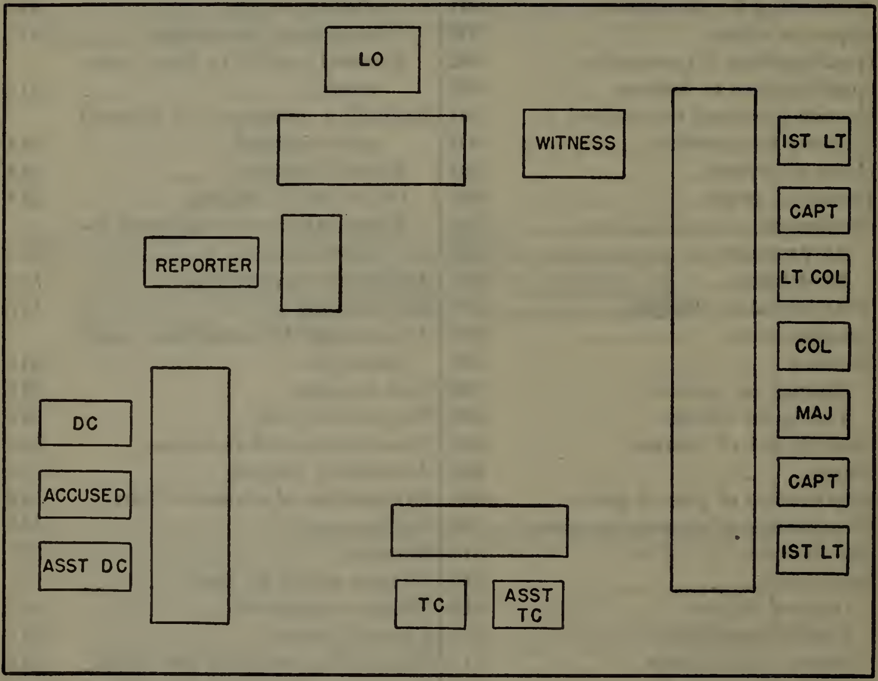
Preconvening procedure

NOTE.—Prior to the president calling a court-martial to order, the law officer (president of a special court-martial) should examine the appointing order, determine that the accused and a quorum are present (including one-third enlisted persons if they have been requested) and that the appointed trial counsel and defense counsel are apparently qualified. See 61*a*. Witnesses should be excluded from the courtroom except when they testify. See 53*f*.

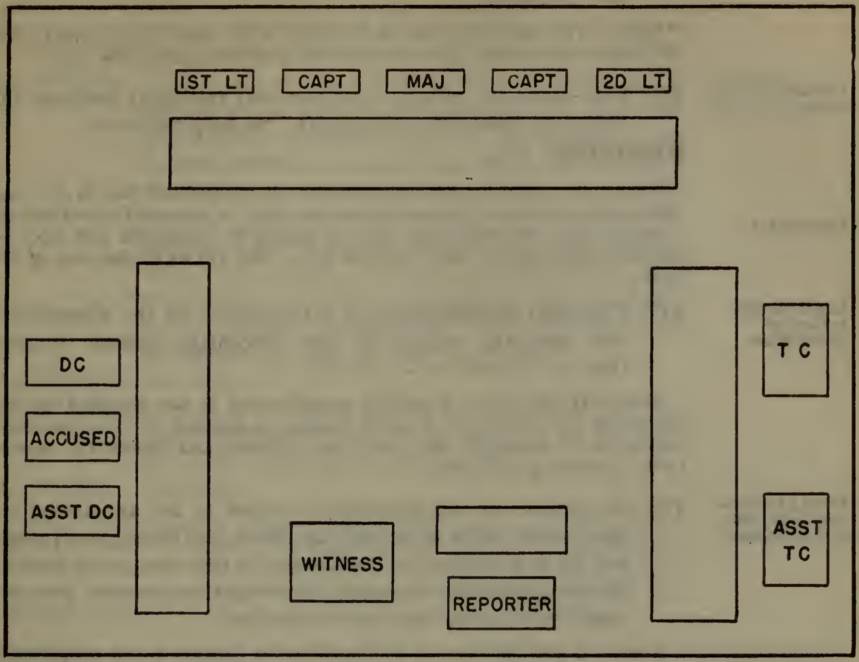
Seating

NOTE.—The members are seated alternately to the right and left of the president according to rank. The law officer is seated apart from the members. Acceptable seating arrangements appear below:

General Court-Martial


LO
WITNESS
IST LT
CAPT
LT COL
COL
MAJ
CAPT
IST LT
REPORTER
DC
ACCUSED
ASST DC
TC
ASST TC

Special Court-Martial



Court called to order

PRES: The court will come to order.

NOTE.—The reporter (TC in a special court-martial without reporter) is responsible for keeping a record of the hour and date of each opening or closing of the court, whether for recess, adjournment, or otherwise, for insertion in the record.

Appointing orders

TC: The court is convened by ———, (as amended by ———,) a copy of which has been furnished to (the law officer,) each member of the court, counsel, the accused, and to the reporter for insertion at this point in the record.

Persons present

The following persons named in the appointing orders are present:

Persons absent

The following persons named in the appointing orders are absent:

Presence of accused

TC: The prosecution is ready to proceed with the trial in the case of the United States against ——————————————————— (Name, rank, organization of accused read from the Charge Sheet), who (is) (are) present in court.

NOTE.—If any accused are present solely to permit swearing in their presence of those officials and clerical assistants of the court who are required to act under oath (53*b* and 112*c*; Art. 42), the TC will make the following announcement: *"In addition, the following accused persons, who will be excused after the oaths have been administered to those officials and clerical assistants of the court who are required to act under oath, are present:* ——————————*."*

***Appointment of reporter**

TC: ——— has been appointed reporter for this court and will now be sworn.

Note.—The reporter rises and stands with right hand raised; the TC, right hand raised, faces the reporter and administers the oath.

***Reporter sworn**

TC: You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God.

REPORTER: I do.

Note.—The reporter records *verbatim* all proceedings had in the case (49*b*, 53*d*), subject to the exceptions set forth in appendix 9 and herein.

Interpreter

Note.—Any interperpreter used is similarly introduced and may be sworn at this point or just before he acts. See 114 as to the form of the oath.

Legal qualifications of prosecution

TC: The legal qualifications of all members of the prosecution are correctly stated in the appointing orders (except that ——————————).

Note.—If the TC of a general court-martial is not qualified as prescribed by Article 27*b*, or if in his absence no member of the prosecution present is so qualified, the court will adjourn and report the matter to the convening authority.

Prior participation by member of prosecution

TC: No member of the prosecution named in the appointing orders has acted as investigating officer, law officer, court member, or as a member of the defense in this case, or as counsel for the accused at a pretrial investigation or other proceedings involving the same general matter.

Note.—If any member of the prosecution appears to be disqualified, the court will take the action indicated in 61*e*. See 6*a*.

DC introduced

TC: By whom will the accused be defended?

DC: The accused [is to be defended by (———, the appointed defense counsel) (and) (———, the appointed assistant defense counsel)] [introduces as individual counsel, ———].

Qualifications of DC

TC: Will counsel representing the accused state whether the legal qualifications of the appointed members of the defense are other than as stated in the appointing orders (and will individual counsel state whether he has been certified as counsel by an appropriate Judge Advocate General, and, if not, whether he has any of the legal qualifications enumerated in Article 27*b*(1))?

DC: The legal qualifications of all appointed members of the defense are correctly stated in the appointing orders (except that ——————————).

Note.—If the appointed DC of a general court-martial is not qualified as prescribed by Article 27*b*, the court will adjourn and report the matter to the convening authority. Similar action will be taken if the appointed DC of a special court-martial is not qualified as prescribed by Article 27*c*. See 61*f*(3).

Note.—Legal qualifications of all counsel for the defense not shown in the appointing orders, including individual counsel, if any, will be stated (61*f*(2)).

---

*Not applicable to special courts-martial if reporter is not used.

NOTE.—If the jurisdictional requirements with respect to appointed counsel are met (61*f*(3)), but no member of the defense present at the trial, including individual counsel, has legal qualifications equivalent to those of any member of the prosecution who is legally qualified, the law officer (president of a special court-martial) will inform the accused:

Explanation of counsel's qualifications

LO (PRES): ———, one of the members of the prosecution is (certified in accordance with Article 27*b*) (qualified in the sense of Article 27*c*(2)). No member of the defense present has equivalent legal qualifications. You have the right to be represented by counsel who has such qualifications. Unless you expressly request that you be represented by the defense counsel who is now present, the court will adjourn pending procurement of defense counsel who is so qualified. Do you expressly request that you be represented by the defense counsel who is now present?

ACCUSED: I do (not).

LO (PRES): Do you also wish the services of counsel who has legal qualifications equivalent to those of the member of the prosecution mentioned?

ACCUSED: I do (not).

NOTE.—If the accused expressly requests that he be represented by the DC then present (including individual counsel) and does not wish the services of a counsel who has the requisite equivalent legal qualifications, the trial will proceed. Otherwise, the court will adjourn pending procurement of a defense counsel who has the requisite qualifications.

Prior participation by DC

TC: Has any member of the defense (including individual counsel) acted as the accuser, a member of the prosecution, investigating officer, law officer, or member of the court in this case?

DC: (No counsel for the defense has so acted.) (———, a member of the defense, has acted as ———.)

NOTE.—If a member of the defense has participated in the same case as a member of the prosecution, he will be excused forthwith (61*f*(4)). See 6*a*. In other cases the TC will advise the accused:

Explanation to accused

TC: ———, (the regularly appointed defense counsel) (———), previously has acted as ——— in this case. He may not now act as a member of the defense unless expressly requested by you. Do you expressly request his services in this case?

ACCUSED: I do (not).

NOTE.—If he does so request, the proceedings continue. If he does not request the services of such counsel, the LO (president of special court-martial) will excuse him.

Action when counsel not desired

NOTE.—If the excusing of counsel not desired by accused, because of prior participation (Art. 27*a*), deprives the accused of that representation to which he is entitled by Articles 27*b* and 38*b* under the circumstances existing before the particular court, the court will adjourn and report the matter to the convening authority (61*f*(4)).

NOTE.—If appropriate the accused may state (Art. 38*b*):

Excusing counsel not desired

ACCUSED: I (do not) desire the (regularly appointed defense counsel) (and) (assistant defense counsel) to act (as associate counsel) in this case.

Note.—Counsel not desired by accused will be excused at this time (61*f*(3)).

LO (PRES): It appears that counsel for both sides have the requisite qualifications.

Note.—When the accused is an enlisted person, he adds:

Request for enlisted membership

LO (PRES): Has the accused made a request in writing that the membership of this court include enlisted persons?

TC: The accused has (not) made such a request (which is herewith submitted to the court).

LO (PRES): This request will be attached to the appointing orders which are to be inserted in the record.

Note.—If such a request has been made and requirements for enlisted membership do not appear to have been met, the court will adjourn and report the matter to the convening authority. See 61*g* and Article 25*c*.

Note.—If an accused is present solely to permit swearing in his presence of the personnel of the court (53*b*, 112*c*; Art. 42), such personnel properly may not be sworn until after the qualifications of counsel have been established and, if he is an enlisted person, his desires with respect to enlisted court members have been made a matter of record.

Court convened

LO (PRES): Proceed to convene the court.

TC: The court will be sworn.

Note.—All persons in the courtroom stand while the oath is administered to the members of the court, LO, and counsel. See 112*d*. Each member raises his right hand as his name is called by the TC in administering the following oath:

Members sworn

TC: You, Colonel ———, Lieutenant Colonel ———, (———), do swear (or affirm) that you will faithfully perform all the duties incumbent upon you as a member of this court; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws and regulations provided for trials by courts-martial, the case of (the) (each) accused now before this court; and that if any doubt should arise not explained by the laws and regulations, then according to the best of your understanding and the custom of war in like cases; that you will not divulge the findings and sentence in any case until they shall have been duly announced by the court; and that you will not disclose or discover the vote or opinion of any particular member of the court upon a challenge or upon the findings or sentence unless required to do so before a court of justice in due course of law. So help you God.

EACH MEMBER OF THE COURT: I do.

Note.—The members lower their hands but remain standing while the TC administers the oath to the LO, who raises his right hand.

***LO sworn**

TC: You, Commander ———, do swear (or affirm) that you will faithfully and impartially perform, according to your conscience and the laws and regulations provided for trials by courts-martial, all the duties incumbent upon you as law officer of this court; that if any doubt should arise not explained by the laws and regulations, then according to the best of your understanding and the custom of war in like cases; and that you will not divulge the findings or sentence in any case until they shall have been duly announced by the court. So help you God.

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*Not applicable in special courts-martial.

LO: I do.

NOTE.—The president administers the oath to the members of the prosecution, who raise their right hands:

Prosecution sworn

PRES: You, Captain ——— and Lieutenant ———, do swear (or affirm) that you will faithfully perform the duties of trial counsel and will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God.

TC (AND ASST TC): I do.

NOTE.—The oath is then administered by the president to the members of the defense, including individual counsel, who raise their right hands:

Defense sworn

PRES: You, Major ———, Lieutenant ———, (and Mr. ———,) do swear (or affirm) that you will faithfully perform the duties of defense (and individual) counsel and will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God.

DC (AND ASST DC): I do.

NOTE.—All persons except the TC are then seated.

LO (PRES): The court is now convened.

NOTE.—If an accused has been present solely to permit swearing in his presence of the personnel of the court (53*b* and 112*c*; Art. 42), the TC should make the following announcement: "———, *an accused who was present during the administration of oaths to the personnel of the court will be excused. The reporter will note that it is now ——— hours, ——— 19—.*" When the court subsequently assembles for the trial of such an accused, the TC, after accounting for the personnel of the court, the accused, and his counsel, will announce: *"The prosecution is now ready to proceed in the case of the United States against ———, who was present during the administration of oaths to the personnel of the court."* The record of trial in the case of such an accused will show all the proceedings had in the case prior to the time that he withdrew after the administration of oaths. Thereafter, the proceedings and record in his case will continue from this point.

NOTE.—If it appears that any witnesses in the case are present in the courtroom, the LO (president of a special court-martial) should make the following announcement: *"Unless they are required to be present for other reasons, all persons expecting to be called as witnesses in the case of ——— will withdraw from the courtroom."*

Challenges:

NOTE.—The TC now states the general nature of the charges and discloses every ground for challenge believed by him to exist in the case (62*b*). If an announcement of the withdrawal of a charge or specification is to be made prior to the arraignment of the accused, the TC should not state the nature of such charge or specification in advising the court of the general nature of the charges (56*d*, 65*a*).

—nature of charge

TC: The general nature of the charges in this case is ———; the charges were preferred by ———; forwarded with recommendations as to disposition by ——— (———) (and ———); and investigated by ———. Neither the law officer nor any member of the court will be a witness for the prosecution.

—grounds disclosed by records

The records of this case disclose [no grounds for challenge] [grounds for the challenge of ———, for the following reasons: he (is not eligible to serve as ———) (is the accuser) (was the investigating officer) (forwarded the charges with recommendation as to disposition) (has previously participated in the case as ———) (is an enlisted member of the same unit as accused) (———)].

NOTE.—See 62*b* as to disclosing grounds for challenge. If disclosed grounds for challenge are undisputed and are within the first eight grounds enumerated in 62*f* the LO (president of a special court-martial) will excuse the LO or member forthwith (62*c* and *h* (2)). If there are enlisted members of the court:

—grounds disclosed by enlisted members

TC: Records indicate that the accused is a member of ———. If any enlisted member of the court is now a member of the same unit, it is requested that he so state.

NOTE.—The eighth ground for challenge provides that an enlisted member of the court may not belong to the same company or corresponding military unit as the accused. If the excusing of an enlisted court member or action on challenges results in an enlisted membership of less than one-third of the total membership of the court present, the court will adjourn and report the matter to the convening authority (62*h*(4)).

—grounds disclosed by members

TC: If any member of the court (or the law officer) is aware of any facts which he believes may be a ground for challenge by either side against him, he should now state such facts.

—procedure

NOTE.—As to the procedure on challenges, see 62*h*. A challenged member (LO) will be given the right to make a statement with respect to the challenge. Note that if LO (president of a special court-martial) takes the stand to testify as to his competency, he continues to rule on interlocutory questions. If a member (LO) is challenged for any of the first eight grounds enumerated in 62*f*, and he admits the fact upon which the challenge is based, he will be excused forthwith. If it is manifest that any other challenge will be unanimously sustained, the LO (president of a special court-martial) may excuse the challenged person "subject to the objection of any member." In case of objection by any member, or in the event of a contested challenge, evidence may be presented to the court upon the issue. Thereafter, the challenged member will withdraw, the court will close, and a vote as to whether the challenge will be sustained will be taken by secret written ballot; a tie vote disqualifies the member challenged. See 62*h*(3).

Challenges for cause should be made before arraignment but may be presented at any stage of the proceedings if the challenger has exercised due diligence or the challenge is based upon grounds enumerated in 62*f*, clauses 1 to 8. Challenges for cause may again be presented, even though once overruled, if for good cause such as newly discovered evidence (62*d*).

The TC will administer the following oath to a challenged member who is to be examined as to his competency:

"You swear (or affirm) that you will answer truthfully to the questions touching your competency as a member of the court in this case. So help you God."

As to limitations on inquiry as to eligibility of LO see 62*g*.

—by prosecution (for cause)

TC: The prosecution (has no) challenges for cause (——— on the ground ———).

(peremptory)

TC: The prosecution has no peremptory challenge (desires to challenge peremptorily ———).

NOTE.—As to peremptory challenges, see 62*e*. When the right to make a peremptory challenge is exercised, the challenged member will be excused forthwith.

—by defense

TC: Does (any of) the accused desire to challenge any member of the court (or the law officer) for cause?

NOTE.—When there is more than one accused, the challenges of each for cause are ordinarily disposed of before their peremptory challenges are made.

(for cause)

DC: No. (The accused challenges ——— for cause on the ground ———.)

(peremptory)

TC: Does (any of) the accused wish to exercise his right to one peremptory challenge against any member?

DC: The accused, ———, (has no peremptory) challenges (——— peremptorily).

Withdrawal of charges

TC: By direction of the convening authority the prosecution withdraws the following charge(s) and specification(s) and will not pursue the same further at this trial: (Specification 2 of Charge II) (———).

NOTE.—A charge or specification withdrawn after the convening of the court and before arraignment should be mentioned by number only—the nature of the offense set forth in a charge or specification so withdrawn should not be made known to the court (56*d*).

The TC now should present to the members of the court (and the LO) copies of only those charges and specifications *upon which the accused is to be arraigned.*

When a specification is withdrawn after evidence has been taken on the issue of guilt or innocence, the reasons therefor should be fully stated in the record of trial (56*b*).

Arraignment:

TC: The charges have been properly referred to this court for trial, and with their specifications, are as follows:

—charges and specifications read

NOTE.—The TC now reads the charges and specifications upon which the accused is to be tried, with the name and description of the accuser, the affidavit, and the reference for trial (pp. 2 and 3 of Charge Sheet). They are copied verbatim into the record at this point, regardless of whether the accused waives the actual reading of the charges and specifications. The accused may waive the actual reading of the charges and specifications in court (65*a*):

—waiver of reading charges

TC: With the consent of the accused I shall omit the reading of the charges, a copy of which is before each member of the court (, the law officer,) and the accused. The charges are signed by ———, a person subject to the code, as accuser; are properly sworn to before an officer of the armed forces authorized to administer oaths; and are properly referred to this court for trial by ———, the convening authority. The charges and specifications, the name and description of the accuser, his affidavit, and the reference for trial will be copied verbatim into the record.

DC: The accused consents.

LO (PRES): The reading of the charges may be omitted.

—notice of service

TC: The charges were served on the accused by (me) (———) on ——— 19—. ———, how do you plead?

NOTE.—This completes the arraignment, of which the pleas are no part (65*a*).

NOTE.—Unless the date of service is at least five days prior to the date of trial in a general court-martial (three days for a special court-martial), except in time of war, the accused may object to this defect in service (Art. 35). If he does so, the court must grant a continuance at this point following arraignment.

Motions, etc.

TC: Before receiving your pleas, I advise you that any motions to dismiss any charge or to grant other relief should be made at this time.

NOTE.—Motions to dismiss and for other relief, such as motions to sever, for continuance, or for examination of the accused because of suspected insanity, are properly presented at this point; all proceedings and action thereon will be recorded. See 53*d*, 67, and 68. Any explanation of the accused's right to move that a charge be dismissed (53*h*, 68*c*) because barred by the statute of limitations, and the accused's response thereto, will be recorded.

DC: The defense [has no motions to be made] [moves that Specification ———, Charge ———, be dismissed because of former acquittal, on ———, by a court-martial convened pursuant to ———, dated ——— 19—, of the charge of ——— (reciting charge and specifications in full)] [moves that ———].

NOTE.—The ruling on a motion to dismiss may be:

Ruling on motion

LO (PRES): (Subject to objection by any member of the court,) the motion is (denied) (granted. The accused will not be required to plead to Specification ———, Charge ———).

Rulings by LO or president on interlocutory questions

NOTE.—The president of a special court-martial rules on interlocutory questions "subject to objection by any member of the court, ———." See 57*c* and *e*, and Article 51*b*. In ruling on a motion for a finding of not guilty, or the question of accused's sanity, the LO rules "subject to objection by any member of the court"; otherwise his rulings on interlocutory questions (other than challenges) are final (57*d*), while those of the president are made as indicated.

Voting on rulings

NOTE.—If any member objects to a ruling when he may properly do so, the court will close and vote orally, beginning with the junior in rank. The court determines by majority vote whether the ruling is sustained or not. A tie vote on a motion for a finding of not guilty or on a motion relating to the question of the accused's sanity is a determination against the accused; otherwise a tie vote is a determination in favor of the accused (57*f*; Art. 52*c*).

Amendment of charges

NOTE.—If charges are amended on motion or otherwise or after a motion to sever is granted in the case of accused jointly charged, the amendment will be formally stated for the record. See 69*b*(3). For example, after a motion to sever is granted, the formal amendment may be in the following form:

Form of amendment after severance

LO (PRES): Each specification is formally amended by striking out the words "and ———," the accused who is not now to be tried, and the words "acting jointly and in pursuance of a common intent," and by inserting after the word "did," the words "acting in conjunction with ———," the accused who is not now to be tried. Trial will proceed on the charges as amended.

Pleas:

NOTE.—The accused and his counsel rise while entering the pleas. In joint and common trials, each accused will plead separately.

DC: The accused, ———, pleads:

To all Specifications and Charges: (Not guilty) (Guilty)

or

—guilty to one specification

To Specification 1 of the Charge: Guilty
To Specification 2 of the Charge: Not guilty
To the Charge: Guilty

or

—with exceptions and substitutions

To Specification ——, Charge ——: Guilty, except the words "——" and "——" (, substituting therefor, respectively, the words "——" and "——," to the excepted words, not guilty, to the substituted words, guilty).

To Charge ———: (Guilty) (Not guilty, but guilty of a violation of Article ——).

etc.

—explanation of plea of guilty

(statute of limitations)

NOTE.—If the accused pleads guilty to a lesser included offense against which the statute of limitations has apparently run, the LO (president of a special court-martial) will advise the accused of his right to interpose the statute in bar of trial and punishment as to that offense (68*c*).

In any case in which a plea of guilty is entered, the meaning and effect will be explained to the accused. See 53*h* and 70. The following explanation may be used:

(form of explanation)

LO (PRES): ———, you have pleaded guilty to (Specification ———, Charge ———) (the lesser included offense of ———). By so doing, you have admitted every act or omission (charged) and every element of that (included) offense. Your plea subjects you to a finding of guilty without further proof of that offense, in which event you may be sentenced by the court to the maximum punishment authorized for it. You are legally entitled to plead not guilty and place the burden upon the prosecution of proving your guilt of that offense. Your plea will not be accepted unless you understand its meaning and effect. Do you understand?

ACCUSED: Yes, sir.

LO (PRES): Understanding this, do you persist in your plea of guilty?

ACCUSED: Yes, sir. [I desire to change my plea(s) to not guilty.]

Advice as to punishment

NOTE.—Upon inquiry by the accused, the LO (president of a special court-martial) should advise him of the maximum punishment which may be adjudged for an offense or offenses to which he has pleaded guilty. Before advising the accused of the maximum punishment, the LO (president of a special court-martial) should refer to chapter XXV. He may also request counsel for both sides to submit legal authority on the question.

If an enlisted person has pleaded guilty to an offense or offenses for none of which dishonorable or bad conduct discharge is authorized, the

LO (president of a special court-martial) should supplement his advice as to the maximum punishment with a statement in substantially the following form: *"However, if the court receives evidence of two or more previous convictions, the maximum punishment which could be adjudged for the offense(s) to which you have pleaded guilty would be: bad conduct discharge, confinement at hard labor for ———, and forfeiture of ———."* This supplemental advice may also be appropriate in the case of an accused who is a prisoner sentenced to a punitive discharge. In this connection, see Section B, Table of Maximum Punishments (127*c*).

If the accused persists in his plea of guilty, and it appears later that he was erroneously advised of a punishment less severe than the maximum legally authorized for the offense or offenses to which he pleaded guilty, the court should advise him of the correct maximum punishment and give him an opportunity to withdraw his plea of guilty. See 70.

Legal authorities

TC: (The prosecution has no legal authorities to present to the court.) (With the permission of the court, I wish to read the following extracts from legal authorities: ———.)

NOTE.—See 44*g*(2).

TC: Does the defense desire to present legal authorities at this time?

DC: The defense does (not).

Presentation of prosecution case

TC: The prosecution has (no) (an) opening statement.

NOTE.—No opening statement is required, and none should be made unless it will clarify the procedure to be followed by the TC. When, for example, the prosecution relies principally upon a confession, and before the confession is introduced a witness is called to give evidence corroborating the commission of the offense, the TC may indicate in an opening statement what he intends to do, in order that the evidence may be properly appraised as it is presented. In this connection, see 44*f*(3).

Stipulation

TC: With the consent of the accused, the prosecution and defense stipulate ———.

NOTE.—Prior to the acceptance of any stipulation the LO (president of a special court-martial) should determine that the accused joins in the stipulation. See 154*b*.

LO (PRES): (Subject to objection by any member of the court,) the stipulation is (not) accepted.

Introduction of witness

TC: The prosecution calls as a witness ———.

NOTE.—When the witness is sworn, he raises his right hand, and the TC administers the oath.

Oath of witness

TC: You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God.

WITNESS: I do.

NOTE.—A witness may be sworn by the oath indicated or by any oath recognized by his religion, or by such acts or ceremony as he declares binding on his conscience (112*d*). As to the competency of witnesses in general, see 148*a*.

NOTE.—The witness now takes his seat in the witness chair. Usually the first two questions asked every witness are formal and are asked by the TC, whether the witness be called by him, by the defense, or by the court.

Formal questions

TC: State your full name, (grade, organization, station, and armed force) (occupation and residence).

WITNESS: ————————————.

TC: Do you know the accused?

WITNESS: ————————————.

NOTE.—If the witness states that he knows the accused, he will normally be asked to point to the accused if he sees him in the courtroom, and to state the name and organization of the accused, if he knows. It is not necessary to ask the second question if the identity of the accused has already been established or if the TC intends to establish such identity at a later stage of the proceedings.

Direct examination

NOTE.—Succeeding questions and answers are recorded in order exactly as spoken. Physical events which transpire, and witnesses' identifications and illustrations given by motions, gestures, or by reference to persons or other physical objects within the court's view, will be described as accurately as possible by the reporter, with the assistance of the TC, DC, and LO (president of a special court-martial), if necessary.

Use of interpreter

NOTE.—At the beginning of testimony given through an interpreter, the record will note such to be the case but the questions and answers are recorded in the manner indicated above. See 114 as to form of oath.

NOTE.—At the conclusion of direct examination TC announces:

TC: The prosecution has no further questions.

Cross-examination

NOTE.—After the prosecution has concluded the direct examination of a witness, the DC cross-examines or declines to cross-examine the witness.

DC: The defense has no (further) questions.

Redirect and recross-examination

NOTE.—If the defense cross-examines the witness the TC may conduct a redirect examination; after he has concluded, the DC may similarly conduct a recross-examination. When both the TC and DC have concluded their questions the TC asks the court:

Examination by court

TC: Are there any questions by the court?

NOTE.—Any member wishing to question the witness, first secures the permission of the LO (president of a special court-martial).

If either the TC or DC wishes to ask further questions of the witness after his examination has been turned over to the court, permission of the court should be secured. Such requests should, in general, be granted, subject to the court's discretionary power to limit or reject superfluous interrogation.

When questions by the court are concluded, the LO (president of a special court-martial) announces:

Excusing witness

LO (PRES): The witness is excused (, subject to recall).

NOTE.—Unless expressly excused from further attendance during the trial, all witnesses will remain subject to call or recall until the trial has been concluded. In an appropriate case (53*f*), the witness may be instructed as follows:

Warning witness

LO (PRES): You are instructed not to discuss your testimony in this case with anyone except the counsel or the accused. You will not allow any witness in this case to talk to you about the testimony he has given or which he intends to give. If anyone, other than counsel or the accused, attempts to talk to you about your testimony in this case, you should make the circumstances known to the counsel for the side originally calling you as a witness.

Recalled

NOTE.—When a witness is recalled, the TC reminds such witness, after he has appeared before the court:

TC: You are reminded that you are still under oath.

Objections:

NOTE.—Objections are treated as follows, e. g.:

TC: What was the accused carrying?
DC: Objection. Any answer to that question is immaterial.

—argument

NOTE.—After hearing pertinent argument, if any, the ruling should be made in substantially the following manner:

—ruling

LO (PRES): (Subject to objection by any member of the court,) objection of defense counsel is (sustained) (overruled).

Striking testimony:

NOTE.—Any remarks or testimony ordered stricken are nevertheless *fully recorded* although they are not considered by the court as evidence. For example:

TC: What was the color of the hat that the accused was wearing?
WITNESS: According to what the police officers told me, he was wearing a black Homburg.

—motion

DC: I move that answer be stricken as hearsay.

—ruling

LO (PRES): (Subject to objection by any member of the court.) the answer will be stricken, and the court is instructed to disregard it.

Contempt procedure

NOTE.—For proceedings in contempt, see appendix 8*b*. Such proceedings will appear in and as a part of the regular record of the case before the court. In this connection, see 118.

Exhibits:

NOTE.—In introducing documentary evidence or other material things, the following procedure should be followed by counsel:

—marking for identification

DC: Request that the reporter mark this exhibit for identification.

NOTE.—The reporter is responsible for keeping a list of exhibits marked for identification, and also as finally accepted into evidence. Prosecution exhibits should be *numbered* consecutively; defense exhibits should be *lettered* consecutively. To clarify the proceedings in regard to exhibits, they should not be renumbered or relettered when admitted in evidence, but should be admitted by the same number or letter they bore "for identification," even though omissions thereby appear in the sequence of numbers or letters of exhibits finally admitted. Ordinarily, the words "for identification" are simply lined out when the exhibit is admitted in evidence.

The reporter will mark on the exhibit (or tag affixed thereto) the appropriate number or letter and state, e. g.:

REPORTER: This will be Defense Exhibit C for identification.

NOTE.—The exhibit is shown to the other side which is given an opportunity to examine it.

—identification

DC (TO WITNESS): Do you recognize Defense Exhibit C for identification?
WITNESS: I do. It is a watch (letter) I found in the accused's pocket when I searched him.
DC: How do you recognize it as being the same one?
WITNESS: ——————————.

NOTE.—When counsel is ready to offer the exhibit in evidence, he states to the court:

—offer

DC: Defense Exhibit C for identification is offered in evidence as Defense Exhibit C (and permission is requested to withdraw it at the conclusion of the trial and substitute a written description (true copy) therefor).

TC: I object because ——————————.

—objection

NOTE.—An exhibit need not be offered in evidence at the time referred to by the witness, and may be held for introduction later in the trial. However, opposing counsel must be given an opportunity to examine it in order that proper cross-examination of the witness in regard to the exhibit may be conducted.

NOTE.—After making the offer, opposing counsel is again given the opportunity to examine the exhibit. Cross-examination may be conducted by opposing counsel, and other evidence may be offered and arguments made by either side prior to a ruling by the LO (president of a special court-martial) as to whether the exhibit will be admitted in evidence.

LO (PRES): (Subject to objection by any member of the court,) the objection is overruled. Defense Exhibit C for identification is admitted in evidence as Defense Exhibit C [(and a description) (true copy) may be substituted].

—description of article for the record

NOTE.—Unless the testimony of a witness has developed a full and accurate description of an object to be withdrawn later (54*d*), counsel or the LO (president of a special court-martial) should give a verbal description at this time, for the record, of such an object, thus affording all parties an opportunity to advise in regard to such description. See 138*c*.

NOTE.—If an exhibit is offered, but is not admitted by the court, the side offering it may request that it be attached to the record for the information of the convening authority (54*d*).

—depositions and authenticated official records

NOTE.—In the case of depositions and properly authenticated official records, the item is marked by the reporter and shown to the opposing counsel. In an appropriate case, the offer might be as follows:

TC: Prosecution Exhibit 17 for identification, a duly authenticated extract copy of the morning report of ———, is offered in evidence as Prosecution Exhibit 17.

—confessions; admissions

NOTE.—Before a confession may be received in evidence the prosecution ordinarily must show that it was voluntary. See 140*a*. If, *upon objection* by the defense to the admission in evidence of a confession or admission on the ground that it was not voluntary, it appears to the court that the accused does not understand his right to testify for the limited purpose of showing the circumstances under which the confession or admission was obtained without subjecting himself to cross-examination upon other issues (149*b*), the LO (president of a special court-martial) should explain to the accused his rights in accordance with 53*h* and 140*a* as follows:

(explanation of accused's right to limit his testimony to circumstances)

LO (PRES): ———, the prosecution has offered in evidence a confession (admission) allegedly made by you and has introduced evidence tending to show that it was voluntarily made by you. As the accused in the case you have the right at this time to introduce any evidence you may desire relevant to the circumstances under which the confession (admission) was obtained. You also have the right to take the stand at this time as a witness for the limited purpose of showing the circumstances under which the confession (admission) was obtained.

If you do that, whatever you say will be considered and weighed as evidence by the court just as is the testimony of other witnesses. You may be cross-examined upon your testimony, but if you limit your testimony to the circumstances surrounding the taking of the confession (admission) you cannot be cross-examined on the question of your guilt or innocence of the offense itself, nor can you be asked on cross-examination whether the confession (admission) is true or false. In other words, you can only be cross-examined upon the issues concerning which you testify and upon your credibility, but not upon anything else.

On the other hand, you need not take the stand at all. You have a perfect right to remain silent, and the fact that you do not take the stand yourself will not be considered as an admission that your confession (admission) was voluntary, nor can it be commented upon in any way by the trial counsel in addressing the court. Do you understand your rights?

ACCUSED: Yes, sir.

LO (PRES): Proceed.

***Excluding members of general courts-martial:**

NOTE.—See 57*d*(2), 57*g*(2), and 73*c*(2) for rules governing certain proceedings had outside the presence, view, or hearing of members of a *general* court-martial. The procedure for an in-court conference requested by counsel may be as follows:

—in-court conference

DC (TC): I would like to confer with the law officer out of the hearing of the members of the court.

LO: Counsel for both sides and the accused will come forward.

NOTE.—After an in-court conference, the procedure may be as follows:

LO: Let the record show that the accused and counsel for both sides conferred with the law officer out of the hearing of the members of the court. (The trial will proceed.) (The court will recess until ——— so that counsel may present certain additional matters to the law officer outside the presence of the members of the court.) (The court will recess. If the members of the court will remain in the vicinity of the courtroom, I shall, as soon as practicable, notify the president of the approximate time of reassembly of the court for the continuation of the trial.)

—out-of-court hearing

NOTE.—During the recess, the law officer will, in the presence of the accused, counsel for both sides and when appropriate, the reporter, conduct a preliminary hearing to determine whether the members of the court should be excluded during the presentation of the matter in question. If the law officer decides to hear the matter out of the presence of the members, he should advise the president of the court informally of the approximate time when the court can reassemble to proceed with the trial. All persons, except those whose presence is necessary, may be excluded from any out-of-court hearing. When the court has reassembled after such a hearing, and the personnel have been accounted for, the following procedure may be appropriate:

---

* Not applicable in special courts-martial.

—recording out-of-court hearing

LO: Let the record show that, during the recess, a hearing was held out of the presence of the members of the court. It was attended by the law officer, the accused, counsel for both sides, and the reporter. The proceedings of the hearing (will not be appended to the record) (will be appended to the record as Appellate Exhibit 1). The trial will proceed.

or

—recording presentation of additional instructions

LO: Let the record show that, during the recess, a hearing was held out of the presence of the members of the court. It was attended by the law officer, the accused, counsel for both sides, and the reporter. Counsel for (both sides) (the defense) (the prosecution) presented proposed additional instructions and argument in support thereof. The additional instructions proposed by the prosecution will be appended to the record as Appellate Exhibit 2. The additional instructions proposed by the defense will be appended to the record as Appellate Exhibit 3. The arguments of counsel (will not be appended to the record) (will be appended to the record as Appellate Exhibit 4). The court is advised that the elements of the offense(s) are as follows: ———.

etc.

Adjournment

NOTE.—In the event of adjournment (a period extending beyond the same day) or a recess, the procedure should be substantially as follows:

LO (PRES): The court will (adjourn) (recess) until ——— hours (. ——— 19—).

Reconvening

PRES: The court will come to order.

NOTE.—If the place of trial is changed, or the court reconvenes at a place other than that where it adjourned, the TC will so state for the record. See 54*e* as to views and inspections.

Accounting for personnel after adjournment or recess

TC: All parties to the trial who were present when the court (adjourned) (recessed) are again present in court (except ———).

NOTE.—The term "parties to the trial," as used above, includes, when appropriate, the law officer and members of the court as well as counsel, the accused, the reporter, and the interpreter. It also includes a witness who was not excused prior to the adjourning, recessing, or closing of the court. If a member of the court is absent *after arraignment,* the absence must be shown to have been the result of challenge, physical disability, or the order of the convening authority (41*d*(4); Art. 29*a*).

New member:

TC: Captain ——— is now present and has been appointed to the court by ———————.

NOTE.—If such member was appointed by the same orders as convened the court, it will be so announced; if by an order not heretofore incorporated in the record, the trial counsel will announce:

TC: A copy of the orders appointing Captain ——— will be attached to the orders appointing the court which are to be inserted in the record.

NOTE.—Proceedings concerning excusing, swearing, and challenging of the new member are substantially as for original members. If the individual joins the court as a member, the record continues:

—reading record

LO (PRES): The record of the proceedings so far had in this case will be read to the new member (by the reporter) (———).

NOTE.—After the record is read:

LO (PRES): The proceedings having been read to date, the trial counsel (defense counsel) may proceed.

Prosecution rests

NOTE.—When the prosecution has completed its case:

TC: The prosecution rests.

Presentation of defense case

DC: The defense has (no) (an) opening statement.

NOTE.—The defense presents an opening statement, if desired, and introduces stipulations, witnesses, and material evidence in a manner similar to that followed by the TC, except the TC administers the oath to all witnesses and asks the first formal questions; DC then takes over direct examination, the prosecution has cross-examination, etc.

Accused as a witness:

NOTE.—The accused may take the stand as a witness in his own behalf, but only at his own request; if he elects to remain silent no comment can be made upon his silence. If he testifies concerning certain specifications only, cross-examination of TC and the court must be limited accordingly. Counsel should announce:

DC: The rights of the accused as a witness have been explained to him and he (elects to remain silent) (wishes to take the stand as a witness).

—explanation of rights

NOTE.—Unless there is an affirmative showing of record that the accused understands his rights as a witness, the court should assure itself through the LO (president of a special court-martial) by questions addressed directly to the accused that he understands his rights. The following explanations may be used:

LO (PRES): ———, as the accused in this case you have these rights:

First, you may be sworn and take the stand as a witness. If you do that, whatever you say will be considered and weighed as evidence by the court just as is the testimony of other witnesses, and you can be cross-examined on your testimony by the trial counsel and the court. (*The following may be used if there is more than one specification*: If your testimony should concern less than all of the offenses charged against you and you do not desire to or do not testify concerning the others, then you may be questioned about the whole subject of those offenses concerning which you do testify, but you will not be questioned about any offenses concerning which you do not testify.)

Second, you may remain silent, that is say nothing at all. You have a right to do this if you wish, and if you do so the fact that you do not take the witness stand yourself will not count against you in any way with the court. It will not be considered as an admission that you are guilty, nor can it be commented on in any way by the trial counsel in addressing the court.

Take time to consult with your counsel and then advise the court whether you wish to testify or to remain silent.

DC: The accused ——————————.

NOTE.—Should the accused elect to take the stand as a witness, the TC will administer the oath and ask the following preliminary questions, after which the procedure follows that of other defense witnesses:

—preliminary questions

TC: State your full name, rank, organization, and station.
ACCUSED: ————————.
TC: Are you the accused in this case?
ACCUSED: Yes, sir.

Defense rests

NOTE.—When the defense has completed its case:

DC: The defense rests.

Rebuttal

NOTE.—The TC may call or recall witnesses in rebuttal; thereafter, the DC may call or recall witnesses in rebuttal. Upon completion of any rebuttal testimony, the TC should announce:

TC: The prosecution has no further evidence to offer. Does the defense have any further evidence to offer?
DC: It does (not).
TC: Does the court wish to have any witnesses called or recalled?
LO (PRES): It does (not).

Witness called by court

NOTE.—If any member desires that any witness be called or recalled the president of a special court-martial may direct such witness to be called, subject to objection by any other member, or close the court and determine its wishes by majority vote. In a trial by general court-martial the LO will rule finally as to whether the witness will be called, except that as to a witness expected to testify in relation to the sanity of the accused the LO will rule subject to objection by any member.

The procedure in the case of a witness called by the court is the same as outlined above; the court may, if it wishes, take over the questioning of the witness at any time after the two formal questions. In the absence of directions from the court to the contrary, however, the TC conducts the examination of a witness called by the court in the same manner as if the witness had been called by the prosecution.

Arguments by counsel

TC: The prosecution waives opening argument. (————.)

NOTE.—See 72. The TC has the right to make the opening argument, and if any argument is made on behalf of the defense, the closing argument. Arguments are not required; they may be oral or written. Either the TC or DC may call to the attention of the court any matters likely to be overlooked by it, and make any reasonably pertinent argument on the law or the facts of the case. Oral arguments are recorded verbatim. A written argument will be attached as an exhibit for the side which presented it.

After arguments or waiver thereof:

Conclusion of case

LO (PRES): Has the prosecution anything further to offer?
TC: It has (not).
LO (PRES): Has the defense anything further to offer?
DC: It has (not).

NOTE.—See 73*c*(2) as to preparation of additional instructions in general courts-martial. After both sides have rested and before the court retires into closed session, the LO (president of a special court-martial) will, in open court, instruct the court (Art. 51*c*):

Charge to court

LO (PRES): The court is advised that the elements of the offense(s) are as follows: ———.

NOTE.—As to each offense charged, a reading of the elements of proof from the discussion of the punitive article involved ordinarily will suffice.

LO (PRES): The court is further advised:

First, that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

Second, that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and he shall be acquitted;

Third, that if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

Fourth, that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the Government.

***Concluding charge by law officer**

NOTE.—See 73*c*(1). The LO of a general court, following his advice to the members of the court and any additional instructions he may have given, should conclude by stating:

LO: In addition to the instructions I have given you, you should observe the rules set forth in paragraph 74*a*, Manual for Courts-Martial. The final determination as to the weight of the evidence and the credibility of the witnesses in this case rests solely upon you members of the court. You must disregard any comment or statement made by me during the course of the trial which may seem to indicate an opinion as to the guilt or innocence of the accused, for you alone have the independent responsibility of deciding this issue. Each of you must impartially resolve the ultimate issue as to the guilt or innocence of the accused in accordance with the law, the evidence admitted in court, and your own conscience.

Court closed for findings

LO (PRES): The court will be closed.

Closed session

NOTE.—All persons including the LO now leave the room except the members of the court. Neither LO nor counsel may consult with the court in closed session. Advice of the LO may be sought whenever necessary, but the court will be opened and the advice will be obtained in open court in the presence of counsel for both sides and the accused. Such proceedings shall be made a part of the record. See 74*e* and Articles 26*b* and 39. For example, request for such assistance properly may be made in regard to additional information concerning the weight which may be given a certain presumption (138*a*); lesser included offenses; reference to the evidence or the rereading of portions of the record; and other matters of law and fact which will enable the court to reach a fair and proper conclusion.

Voting on findings

When the court has been closed the members vote on the findings. For the method of voting, see 74*d* and Article 52. A two-thirds vote is essential to a finding of guilty of any offense (except spying which carries a mandatory death penalty and the vote must be unanimous).

---

*Not applicable in special courts-martial.

In determining the number of votes *required*, fractions are counted as one— thus, it requires five votes of a seven, or six votes of an eight, member court for a two-thirds vote. See 74*d*(3).

When there is more than one accused, separate findings will be made as to each accused.

Voting procedure

Voting is by secret written ballot and is obligatory. Normally, a vote is first taken upon the specifications under a charge, and then upon the charge. The members normally vote upon a specification or charge by marking on their ballots: "Guilty;" "Not guilty;" or "Not guilty, but guilty of ———." The junior member of the court shall in each case count the votes; the count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court. The court may reconsider any finding before it is announced. See 74*d*(3) as to reconsideration of findings of guilty after announcement. Members of the court may discuss the case freely in closed session before and after voting, but the particular vote of any member shall not be disclosed.

***LO called after findings made**

NOTE.—When a general court-martial has finally voted on the findings, it may request the LO and reporter to appear before it and assist in putting the court's findings (Art. 39) in proper form. The reporter records these proceedings (74*f*(1)). Advice should be requested *in open court* at any time before a final vote is taken on findings in any case of doubt which may arise, as for example, from an apparent variance between the evidence adduced and the offense charged. In this connection, see 74*e*.

If the LO did not assist the court to put the findings in proper form, the president, before announcing the findings, should present them to the LO to permit him to examine them for defects in form. If it appears to the LO that the court has made an ambiguous or inconsistent finding, he may give the court appropriate instructions and advise it to close and deliberate and vote further. If the court is in doubt as to whether it intended to find in accordance with the form of a finding prepared by the LO, the court may close and deliberate and vote further.

Findings announced:

PRES: The court will come to order.

TC: All parties to the trial who were present when the court closed are now present (except ———).

NOTE.—If the accused is found not guilty of all specifications, the president announces:

—acquittal

PRES: ———, it is my duty as president of this court to advise you that the court in closed session and upon secret written ballot has found you not guilty of (the) (all) Specification(s) and Charge(s). The court will adjourn to meet at my call.

NOTE.—If the accused is found guilty of any specification, the president announces:

—conviction

PRES: ———, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, (two-thirds) (all) of the members present at the time the vote was taken concurring in each finding of guilty, finds you: [Of (all) the Specification(s) and Charge(s): Guilty] [Of Specification ———, Charge ———: (Guilty) (Not guilty). Of Charge ———: (Guilty) (Not guilty).

(itemized)

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*Not applicable in special courts-martial.

(with exceptions and substitutions)

Of Specification ———, Charge ———: Guilty, except the words "———" and "———" (, substituting therefor, respectively, the words "———" and "———," of the excepted words, not guilty, of the substituted words, guilty). Of Charge ———: (Guilty) (Not guilty, but guilty of a violation of Article ———)].

etc.

NOTE.—For further instructions as to the forms of findings, see 74*b* and *c*; for examples of proper findings, see the pertinent portions of 158 and appendices 10*a* and 15*a*.

NOTE.—Announce only the required fraction of votes, not the actual number of members who concurred in the findings of guilty.

Presentence procedure

LO (PRES): The court will now hear the personal data concerning the accused shown on the charge sheet, and will receive evidence of previous convictions, if any.

Personal data from charge sheet:

TC: The first page of the charge sheet shows the following data concerning the accused: ———.

—verified by accused

TC: Are these data correct?

DC: (They are correct.) (The accused objects to ———.)

NOTE.—If in error, corrections should be made. Errors claimed by the accused which the TC is not able readily to verify will, if of minor importance, be noted in the record and no further action taken upon them by the court; if of material importance the court may direct verification of the error claimed before proceeding to vote upon the sentence.

Evidence of previous convictions

TC: I have evidence of (no) (———) previous convictions of (an) offense(s) committed [during the current enlistment (current voluntary extension) and within three years preceding the commission of an offense of which the accused has been convicted at this trial] [———] to submit (as follows: ———).

—verified by accused

TC: Has the accused any objection to the evidence of previous convictions read?

DC: (No objection.) (The accused objects to ———.)

NOTE.—See 75*b*(2). The accused may object, on proper grounds, and require production of proper evidence of such convictions, or the rejection of improper evidence offered. Admissible evidence of previous convictions should be offered in evidence, marked, and admitted as an exhibit in the usual manner.

Matter in aggravation, mitigation, or extenuation

NOTE.—This is the proper time for counsel to introduce evidence in aggravation (75*b*(3)), extenuation, or mitigation, and for accused to make a statement if he desires (75*c*).

NOTE.—Unless there is an affirmative showing of record that the accused understands his right to make an unsworn statement in mitigation or extenuation of the offenses of which he stands convicted, advice will be given substantially as follows:

Rights of accused

LO (PRES): ———, you are advised that you may now present evidence in extenuation or mitigation of the offenses of which you stand convicted. You may, if you wish, testify under oath as to such matters, or you may remain silent, in which case the court will not draw any inferences from your silence. In addition, you may, if you wish, make an unsworn statement in mitigation or extenuation of the offenses of which you stand convicted. This unsworn statement is not evidence, and you cannot be cross-examined upon it, but the prosecution may offer evidence to rebut anything contained in the statement. The statement may be oral or in writing, or both. You may make it yourself, or it may be made by your counsel, or by both of you. Consult with your counsel and advise the court what you desire to do.

DC: The accused ——————————.

NOTE.—Any statement made by the accused or his counsel will be recorded verbatim, even though submitted in writing.

Court closed for sentence

LO (PRES): The court will be closed.

NOTE.—Before closing, the LO may advise the court of the maximum punishment which may be imposed (76*b*(1)). For procedure in rehearings and new trials, see 81*d*. All present including LO leave the room except the members of the court.

Voting procedure

NOTE.—Customarily members propose sentences after which the court votes on each sentence beginning with the lightest until one proposed sentence receives the required number of votes. A sentence of death requires a unanimous vote; a sentence of imprisonment *in excess* of 10 years requires the concurrence of three-fourths of the members present. Any other sentence requires concurrence of two-thirds of the members present (Art. 52*b*).

If all the proposed sentences are voted upon and none adopted, further discussion may be had and either new proposals sought or the sentences already proposed plus any new ones, again put to vote.

Limitation on sentence

NOTE.—The sentence must be within the maximum limits prescribed in chapter XXV and within the jurisdiction of the court to adjudge. As to rehearings and new trials, see 81*d* and Article 63. The court will adjudge a single sentence for all the offenses of which the accused was found guilty. A separate sentence must be adjudged for each accused.

For approved forms of sentences see appendix 13.

Court opens

PRES: The court will come to order.

TC: All the parties to the trial who were present when the court closed are now present (except ———).

Sentence

PRES: ———, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, (two-thirds) (three-fourths) (all) of the members present at the time the vote was taken concurring, sentences you: ————.

NOTE.—It is customary for the accused to stand immediately before the president when the sentence is pronounced.

NOTE.—As in the case of findings, announce only the required fraction of votes, not the actual number of members who concurred in the sentence.

LO (PRES): Has the prosecution any other cases to try at this time?

TC: I have nothing further.

Adjournment

PRES: The court will adjourn to meet at my call.

b. CONTEMPT PROCEDURE.

NOTE.—When it becomes necessary for a court to take summary action on a contempt (118*a*), an example of its proceedings would be:

Advising offender

LO (PRES): The proceedings in the case now before the court will be suspended. ———, you (have used menacing words and gestures in the presence of this court) (have disturbed the proceedings of this court by (riotous and) disorderly conduct) (———). As the record will show, you (have been warned repeatedly about your conduct) (have persisted in disturbing the proceedings of this court) (———). For example, you (have threatened the court with action you will take against it because of its rulings;) (have been contemptuous and insolent in your objections and arguments;) (———).

Opportunity to show cause

You now have an opportunity to show cause why you should not be held in contempt.

NOTE.—After hearing pertinent argument and evidence, if any, the following ruling will be made:

Preliminary ruling

LO (PRES): Subject to objection by any member of the court, it is my ruling that you should (not) be held in contempt.

NOTE.—If, as a result of a ruling of the LO (president of a special court-martial) that is not objected to, there has been a preliminary determination that the person involved not be held in contempt, the court will resume its regular proceedings.

Voting on preliminary ruling

If any member objects to a ruling of the LO (president of a special court-martial), the court will close and determine by majority vote whether the ruling shall be sustained. See 118*b*. A tie vote shall be a determination against the person involved.

Closed session

If, as a result of the vote of the court, or a ruling of the LO (president of a special court-martial) that is not objected to, there has been a preliminary determination that the person involved be held in contempt, the court will determine in closed session whether the person involved should be held in contempt, and, in the event it so determines, will assess a punishment. See 118*a*. Thereafter, the court opens and:

Holding of contempt and punishment

PRES: It is my duty as president of this court to inform you that the court, in closed session and upon secret written ballot, [has held you not guilty of contempt of this court] [two-thirds of the members present at the time the vote was taken concurring, holds you guilty of contempt of this court. And also in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, adjudges the following punishment: (To pay to the United States a fine of $50 and to be confined at hard labor for 10 days) (———)].

LO (PRES): Proceed with the case.

c. REVISION PROCEDURE.

Proceedings in revision:

LO (PRES): The court will come to order.

TC: All parties who were present when the court adjourned are now present (except ———).

NOTE.—No mention need be made of those who were not present at the close of the previous session. No member will sit in revision proceedings who was not present at the close of the last session in the case, but all members who were present at the last session should be there. See 80 and Article 29*a*.

TC: These proceedings in revision have been (directed by the following communication: ——— which will be inserted at this point in the record) (undertaken by the court on its own motion in order to ———). —directed by

NOTE.—When appropriate, the court may request the TC or LO to give it further advice in regard to the matters before it. The case will not be reopened by calling witnesses or otherwise.

LO (PRES): The court will be closed.

NOTE.—After such deliberation and action as is appropriate, the proceedings continue.

PRES: The court will come to order.

TC: All parties who were present when the court closed are now present (except ———).

PRES: The court in closed session and upon secret written ballot, a majority of the members concurring, revoked its former (findings) (and) (sentence). Further, in closed session and upon secret written ballot, (two-thirds) (all) of the members present at the time ———. Court votes

NOTE.—The proceedings continue and are recorded as before indicated with reference to findings and sentence. New findings and sentence

or

PRES: The court was closed and upon secret written ballot, (a majority) (two-thirds) (three-fourths) (all) of the members concurring, the court respectfully adheres to its former ———.

PRES: The court will adjourn to meet at my call. Adjournment

NOTE.—The record is authenticated in the same manner as the record of trial. See appendix 9*b*.

Appendix 9

GUIDE FOR PREPARATION OF RECORD OF TRIAL BY GENERAL COURT-MARTIAL AND BY SPECIAL COURT-MARTIAL WHEN A VERBATIM RECORD IS PREPARED

a. RECORD OF TRIAL.

Erasures

NOTE.—Erasures or interlineations will be initialed by those who authenticate the record.

Margins

Pages will be numbered at the bottom; margins of 2½ inches will be left at the top to permit binding, and 1 inch at the bottom and left side of each page, using legal size paper.

Marginal notes

Words on the left margin of this appendix are not part of the form of record.

Record to be complete

Unless otherwise provided in this manual (e. g., 57*g*(2); 73*c*(2)), all proceedings in the case will be recorded verbatim, including oral arguments, subject to the instructional notes and examples shown in appendix 8 and herein.

Use of guide

This appendix is not a complete record of trial. It is to be used by the reporter and trial counsel as a guide to the preparation of the completed record of trial in all general court-martial cases, and in all special court-martial cases in which a verbatim record is prepared. See 82 for instructions pertaining to the preparation of a record of trial by general court-martial, and 83 for instructions pertaining to the preparation of a record of trial by special court-martial. The reporter and trial counsel should also consult appendix 8, as it shows the manner in which many items of procedure should be recorded.

Title

RECORD OF TRIAL
of
____
(Last name, first name, middle initial) (Service number) (Rank or grade)
____
(Organization and armed force) (Station or ship)
by
________ COURT-MARTIAL

appointed by ______________________
(Title of convening authority)
____
(Command of convening authority)
Tried at
______________________ on ______________________ 19__
(Place or places of trial) (Date or dates of trial)

Index

INDEX

Page
Introduction of counsel ________________
Challenges ________________
Arraignment ________________
Motions ________________
Pleas ________________
Findings ________________
Sentence ________________
Proceedings in revision ________________

Witnesses

TESTIMONY

Name of Witness	Direct and redirect	Cross and recross	Court
Prosecution			
Defense			
Court			

Exhibits

EXHIBITS ADMITTED IN EVIDENCE

Number or Letter	Description	Page where	
		Offered	Admitted

Copies of record

——— copy of record furnished the accused as per attached certificate or receipt.

——— copies of record forwarded herewith.

Receipt for record

RECEIPT FOR COPY OF RECORD

I hereby acknowledge receipt of a copy of the above-described record of trial, delivered to me at ——— this ——— day of ———, 19—.

(Signature of accused)

Certificate in lieu of receipt

CERTIFICATE

———, ——— 19—

(Place) (Date)

I certify that on this date delivery of a copy of the above-described record of trial, including all exhibits admitted in evidence or descriptions thereof, was made to the accused, ———, at ———,

(Name of accused) (Place of delivery)

by ————————————————————————————,
(Means of effecting delivery, i. e., mail, messenger, etc.)
and that the receipt of the accused had not been received on the date this record was forwarded to the convening authority. The receipt of the accused will be forwarded as soon as it is received.

————————————————————
(Signature of trial counsel)

Appointing orders

Proceedings of a ——— court-martial which met (at) (on board) ———. at ——— hours, ———19—, pursuant to the following orders:

NOTE.—Here insert a literal copy of the orders appointing the court and copies of any amending orders. Any request of an enlisted accused for enlisted court members will be inserted immediately following the appointing orders, together with any declaration of the nonavailability of such enlisted persons.

Accounting for personnel

PERSONS PRESENT

PERSONS ABSENT

NOTE.—List LO, if any, and all members of the court, prosecution, and defense as present or absent, as announced by the trial counsel. Only rank or grade and name will be shown unless service number is necessary to distinguish between two persons.

Presence of accused

The accused, —————, was present.

Swearing reporter

The appointed reporter, —————, was sworn.

NOTE.—The remainder of the record of trial follows the actual proceedings had in court. The reporter records all the proceedings verbatim, subject to the instructions set forth in appendix 8 and herein.

Time of session

NOTE.—The reporter will note and record the time and date of the beginning and ending of each session of the court, including the opening and closing of the court during trial. For example:

The court was called to order at ——— hours, ——— 19—.
The court (adjourned) (recessed) at ——— hours, ——— 19—.
The court (closed) (opened) at ——— hours, ——— 19—.

Administration of oaths

NOTE.—It is not necessary to record verbatim the oath actually used, whether it be administered to a witness, a challenged member, the law officer, counsel, or the court. By whatever form of oath, affirmation, or ceremony the conscience of the witness is bound (112*d*; app. 8*a*), only the fact that a witness was sworn (or affirmed) is to be recorded. However, if preliminary qualifying questions are asked a witness prior to the administration of an oath (e. g., 148*b*), the questions and answers will be recorded verbatim. Note that such preliminary questions and answers do not eliminate the requirement that an oath be administered. There follow examples of the recording of the administration of various oaths:

The appointed interpreter, —————, was sworn.

The members of the court (, the law officer,) and the personnel of the prosecution and defense were sworn.

The challenged (member) (law officer) was sworn to testify concerning his competency to act as a (member) (law officer) of the court, and testified as follows:

Accounting for personnel during trial

NOTE.—After the reporter is sworn, he will record verbatim the statements of the trial counsel with respect to the presence or absence of personnel of the court, counsel, and the accused. The reporter will note whether, when a witness is excused, he withdraws from the courtroom or, in the case of the accused, whether he resumes his seat. Similarly, if a challenged member withdraws from the court while it votes on a challenge, is excused as a result of a challenge, or resumes his seat after the court has voted on a challenge, the reporter will note this fact in the record. Examples of the manner in which such facts should be recorded are as follows:

The witness (withdrew from the courtroom) (resumed his seat at the counsel table).

———, the challenged member, withdrew from the court.

——— resumed his seat as a member of the court.

Recording testimony

NOTE.—The testimony of a witness will be recorded verbatim in the following form (assuming the witness to have been called by the prosecution):

——— was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:
Q. State your full name, (etc.) ———.
A. ———.
Q. ———?
A. ———.

CROSS-EXAMINATION

Questions by the defense:
Q. ———?
A. ———.

REDIRECT EXAMINATION

Questions by the prosecution:
Q. ———?
A. ———.

RECROSS-EXAMINATION

Questions by the defense:
Q. ———?
A. ———.

EXAMINATION BY THE COURT

Questions by (the law officer) (a court member):
Q. ———?
A. ———.

REDIRECT EXAMINATION

Questions by the prosecution:
Q. ———?
A. ———.

RECROSS-EXAMINATION

Questions by the defense:
Q. ———?
A. ———.

b. AUTHENTICATION OF RECORD OF TRIAL.

(1) *By general court-martial.*

President

(Captain) (Colonel), *———, President [or (Commander) (Lieutenant Colonel), *———, a member in lieu of the president because of his (death) (disability) (absence).]

Law officer

(Commander) (Lieutenant Colonel), *———, Law Officer [or (Lieutenant Commander) (Major), *———, a member in lieu of the law officer because of his (death) (disability) (absence).]

(2) *By special court-martial.*

President

(Commander) (Lieutenant Colonel), *———, President [or (Commander) (Lieutenant Colonel), *———, a member in lieu of the president because of his (death) (disability) (absence).]

Trial Counsel

(Lieutenant) (Captain), *———, Trial Counsel [or (Lieutenant, jg) (First Lieutenant), *———, Assistant Trial Counsel, because of (death) (disability) (absence) of the trial counsel.] [or (Lieutenant Commander) (Major), *———, a member in lieu of the trial counsel and the assistant trial counsel because of (death) (disability) (absence) of the trial counsel, and of (death) (disability) (absence) of the assistant trial counsel.]

*NOTE.—The further identification of members, LO, or counsel as to grade, organization, etc., will be as indicated in the orders appointing the court. If there is any change therein, the identification should show the present grade and organization followed by "formerly ———."

c. EXAMINATION OF RECORD BY DEFENSE COUNSEL.

NOTE.—When the defense counsel has examined the record of trial prior to its being forwarded to the convening authority, the following form is appropriate:

Form

"I have examined the record of trial in the foregoing case.

(Captain) (Lieutenant) ———, Defense Counsel"

d. CERTIFICATE OF CORRECTION.

Form

——— 19—.

United States
v.

The record of trial in the above case, which was tried by the ——— court-martial appointed by ———, dated ——— 19—, (at) (on board) ———, on ——— 19—, is corrected by the insertion on page ———, immediately following line ———, of the following:

Correction

"The appointed reporter, ———, was sworn."

This correction is made because the reporter was sworn at the time of trial but a statement to that effect was omitted, by error, from the record.

Authentication

NOTE.—The certificate of correction is authenticated as indicated above for the record of trial in the case.

Accused's receipt for certificate

Copy of the certificate received by me this ——— day of ———, 19—.

____

(Signature of accused)

Disposition in record

NOTE.—The certificate of correction will be bound at the end of the original record immediately before the action of the convening authority.

e. ARRANGEMENT OF ORIGINAL RECORD WITH ALLIED PAPERS.

When forwarded to the appropriate Judge Advocate General, a record of trial by general or special court-martial will be arranged in the sequence shown below. The record should be bound within protective covers. The arrangement shown may be used by the reporter and trial counsel as a guide to the preparation of a verbatim record of trial for forwarding to the convening authority.

1. Chronology Sheet.
2. Court-Martial Data Sheet.
3. Court-Martial Orders; 10 copies promulgating the result of trial as to each accused. See appendix 15*a*.
4. Signed review of staff judge advocate or legal officer, in duplicate (85; Art. 61).
5. Charge Sheet.
6. Report of investigating officer, required by 34 and Article 32, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.
7. Advice of staff judge advocate or legal officer, required by 35 and Article 34.

NOTE.—Items 6 and 7 need not appear with a special court-martial record.

8. Records of former trials.
9. Record of trial proper in the following order:
    (*a*) Index sheet.
    (*b*) Receipt of accused, or certificate of trial counsel, showing delivery of copy of record to accused.
    (*c*) Record of proceedings in court.
    (*d*) Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.
    (*e*) Exhibits admitted in evidence.
    (*f*) Clemency papers.
    (*g*) Offered exhibits not received in evidence, but which are attached at request of counsel. Pages of record where offered and rejected will be noted in front of each exhibit.
    (*h*) Appellate exhibits, such as proposed instructions (73*c*(2)), preliminary evidence, and, when directed by the LO, written or oral arguments or briefs of counsel heard outside the presence of the members of the court (57*g*(2)).
10. Briefs of counsel.

f. ADDITIONAL COPIES OF RECORD.

A copy of the record of proceedings in court, including copies of all exhibits received in evidence or descriptions thereof (items 9(*a*), (*c*), and (*e*), app. 9*e*), will be prepared for each accused. In general and special court-martial cases in which the sentence adjudged affects a general or flag officer, or extends to death, dismissal, dishonorable or bad conduct discharge, or confinement for one year or more, two additional copies of the record of proceedings in court, including copies of all exhibits received in evidence or descriptions thereof (item 9(*a*), (*c*), and (*e*), app. 9*e*), will be prepared. In this connection, see 49*b*(2), 82, and 83. All copies of the record, except that delivered to the accused, will be bound separately and inclosed with the original record of trial when it is forwarded to the convening authority or to the appropriate Judge Advocate General. In this connection, see 82*g*(2).

Appendix 10

GUIDE FOR PREPARATION OF RECORD OF TRIAL BY SPECIAL COURT-MARTIAL WHEN A VERBATIM RECORD IS NOT PREPARED

a. RECORD OF TRIAL.

NOTE.—See first three marginal notes at beginning of appendix 9*a*. If a verbatim record is not prepared (see 7 and 83*b*), a summarized report of testimony, objections, and other proceedings is permitted. Either party may, however, submit his arguments in writing to be attached as exhibits, appropriate reference being made at the proper place in the record.

The procedure in court will follow appendix 8. This appendix is to be used as a general guide; the actual record may depart from it in numerous particulars. The manner of summarizing several items of procedure is shown in appendix 9*a*.

Title

RECORD OF TRIAL
of

(Last name, first name, middle initial) (Service number) (Rank or grade)

(Organization and armed force) (Station or ship)

by

SPECIAL COURT-MARTIAL

appointed by ——————————
(Title of convening authority)

(Command of convening authority)

Tried at

—————————— on —————————— 19—
(Place or places of trial) (Date or dates of trial)

Appointing orders

The court met (at) (on board) ———, at ——— hours ——— 19—, pursuant to the following orders:

NOTE.—Here insert a literal copy of the appointing orders and copies of any amending orders. Any request of an enlisted accused for enlisted court members, together with any declaration of the nonavailability of such enlisted persons, will be inserted immediately following the orders.

Members of the court and counsel present and absent

PERSONS PRESENT

PERSONS ABSENT

Accused and defense counsel present

The accused and the following (regularly appointed defense counsel and assistant defense counsel) (counsel introduced by him) were present:

Swearing reporter; interpreter

The appointed (reporter) (interpreter), ———, was sworn.

NOTE.—Applicable only when a reporter or interpreter is used.

Qualification of prosecution counsel

The trial counsel stated that the legal qualifications of all members of the prosecution were correctly stated in the appointing orders (except that ———).

Prior participation of prosecution counsel

The trial counsel further stated that no member of the prosecution had acted as investigating officer, law officer, court member, or as a member of the defense in this case, or as counsel for the accused at a pretrial investigation or other proceeding involving the same general matter.

NOTE.—If a member of the prosecution is disqualified because of prior participation in the same case, the disqualifying fact will be shown, and the record will reflect the withdrawal of disqualified counsel from the court.

Qualification of defense counsel

The defense counsel stated that the legal qualifications of all members of the defense were correctly stated in the appointing orders (except that ———).

NOTE.—Legal qualifications of all counsel for the defense not shown in the appointing orders, including individual counsel, will be shown.

Prior participation of defense counsel

The defense counsel stated that no member of the defense had acted as the accuser, a member of the prosecution, investigating officer, law officer, or member of the court in this case.

NOTE.—If a member of the defense has acted as a member of the prosecution, the record will show that he was excused and withdrew from the court. If a member of the defense acted in another capacity, the record will show that the president explained to the accused that such counsel could represent him only at his express request, and that the accused so requested, or that suitable action was taken, either by excusing the particular counsel or by adjournment pending the procurement of a counsel satisfactory to the accused. Appendix 8*a* shows the procedure to be taken.

Enlisted membership

The trial counsel announced that the accused had (not) made a request in writing that the membership of the court include enlisted persons.

NOTE.—This announcement will not be made if the accused is not an enlisted person.

Court and counsel sworn

The members of the court and the personnel of the prosecution and defense were sworn.

Challenges

The following members of the court were excused and withdrew for the reasons stated opposite their respective names:

Captain ——— (excused without challenge as being the accuser).

Lieutenant ——— (excused upon challenge for cause by the accused).

Lieutenant ——— (excused upon peremptory challenge by the accused).

There was no contest with respect to the challenging of any of the members for cause (except as follows:).

NOTE.—Insert a summary of the proceedings had with respect to each contest. For example, if a member was challenged for cause, but was not excused from the court, the record will show the grounds for the challenge, a summary of evidence presented, if any, and the action of the court.

Arraignment

The accused was then arraigned upon the following charges and specifications:

NOTE.—Here insert the Charge Sheet (using in the accused's copy of the record, the copy of the charges furnished to him) ; if sufficient copies of the Charge Sheet are not available, copy verbatim from pages 2 and 3 of the Charge Sheet the charges and specifications and the name and description of the accuser, the affidavit, and the reference to the court for trial.

Motions

NOTE.—The substance of any motions made by the accused will be recorded, together with the ruling of the court thereon.

Pleas

NOTE.—The pleas of the accused will be entered in the following form:

The accused pleaded as follows:

To all the Specifications and Charges: (Not guilty) (Guilty).

or

To the Specification of Charge I: (Not guilty) (Guilty).
To Charge I: (Not guilty) (Guilty).

etc.

Explanation of plea of guilty

NOTE.—When the president explains the meaning and effect of a plea of guilty, the record should show:

The president of the court explained to the accused the meaning and effect of his plea of guilty, after which the accused answered that he understood (but persisted in his plea of guilty) (and stated that he desired to change his plea of guilty to not guilty) (———).

Opening statement

The trial counsel made (an) (no) opening statement.

Presentation of prosecution case

NOTE.—The record will contain a summary of the testimony presented. An example of the manner in which testimony may be summarized follows:

Testimony

The following witnesses for the prosecution were sworn and testified in substance as follows:

Sgt Richard Roe, Co C, 31st Inf, Fort Sill, Oklahoma.

DIRECT EXAMINATION

I know the accused, Sam Snooker, who is in the military service and a member of my company. We both sleep in the same barracks. When I went to bed on the night of October 17, 1951, I put my wallet under my pillow. The wallet had $7.00 in it; a $5.00 bill and two $1.00 bills. Sometime during the night something woke me up but I turned over and went to sleep again. When I woke up the next morning, my wallet was gone.

CROSS-EXAMINATION

I don't know the serial numbers on any of the bills. One of the $1.00 bills was patched together with scotch tape and one of the fellows told me that the accused had used a $1.00 bill just like that in a poker game the day after my wallet was missing.

Objection and ruling

Upon objection by the defense, so much of the answer of the witness as pertained to what he had been told was stricken.

Introduction of exhibits

The prosecution offered in evidence a duly authenticated extract copy of the morning report of Company C, 31st Infantry, which contained entries pertaining to the accused for the dates 20 and 24 October 1951. The defense objected to the admission of this document on the ground that the reporting officer had no personal knowledge of the facts reported therein. After argument by counsel for both sides, the extract copy was admitted in evidence and marked Prosecution Exhibit 1.

Presentation of defense case

The defense counsel made (an) (no) opening statement.

Testimony

The following witnesses for the defense were sworn and testified substantially as follows:

Explanation of accused's rights

The rights of the accused as a witness were explained to him by the president of the court. The accused elected to take the stand as a witness. He was sworn and testified in substance as follows:

Stipulation

The defense offered in evidence a stipulation entered into between the trial counsel, defense counsel, and the accused. There being no objection, the stipulation was admitted in evidence and marked Defense Exhibit A.

Closing arguments

The prosecution made (an) (no) argument.

The defense made (an) (no) argument.

The prosecution made (a) (no) closing argument.

Instructions

Pursuant to Article 51*c*, the president instructed the court as to the elements of each offense charged, the presumption of innocence, reasonable doubt, and burden of proof.

Findings

Neither the prosecution nor the defense having anything further to offer, the court was closed. Thereafter, the court opened and the president announced that, in closed session and upon secret written ballot, (the accused was found not guilty) (two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, the accused was found:

Of all the Specifications and Charges: Guilty.

or

Of the Specification of Charge I: Guilty.
Of Charge I: Guilty.
Of the Specification of Charge II: Not guilty.
Of Charge II: Not guilty).

etc.

Data as to service, etc.

The trial counsel read the data as to age, pay, service, and restraint of the accused as shown on the charge sheet. The trial counsel (stated that he had no evidence of previous convictions to submit) (read the attached evidence of previous convictions, Prosecution Exhibit ———).

Evidence in extenuation or mitigation

After the accused was advised by the president of his right to present evidence in extenuation or mitigation, including the right to make an unsworn statement, (the defense counsel stated that he had nothing further to offer) (the accused made an unsworn statement, in substance as follows:) (———).

Sentence

Neither the prosecution nor the defense having anything further to offer, the court was closed. Thereafter, the court opened and the president announced that in closed session and, upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, the accused was sentenced:

To ——————————.

The court adjourned at ——— hours, ——— 19—. **Adjournment**

NOTE.—The record will be authenticated as prescribed in 83*c* and as shown in appendix 9*b*(2). **Authentication**

I have examined the record of trial in the foregoing case. **Examination by defense**

(Captain) (Lieutenant) ———, Defense Counsel

b. ARRANGEMENT OF ORIGINAL RECORD WITH ALLIED PAPERS.

When forwarded by the convening authority, such a record of trial by special court-martial is arranged in the sequence shown below. See 83*b*. The record should be bound within protective covers. The arrangement shown may be used by the trial counsel as a guide for the preparation of a record for forwarding to the convening authority.

1. Chronology Sheet.
2. Court-Martial Data Sheet.
3. Court-Martial Orders; four copies promulgating the result of trial as to each accused. See appendix 15*a*.
4. Charge Sheet (unless inserted in record of trial proper).
5. Any papers which accompanied the charges when referred for trial unless included in the record proper.
6. Records of former trials.
7. Record of trial proper in the following order:
    (*a*) Receipt of accused, or certificate of trial counsel, showing delivery of copy of record to accused. (For form, see appendix 9*a*.)
    (*b*) Record of proceedings in court (summarized).
    (*c*) Action of convening authority.
    (*d*) Exhibits admitted in evidence.
    (*e*) Clemency papers.
    (*f*) Offered exhibits not received in evidence, but which are attached at request of counsel.
8. Briefs of counsel.

c. ADDITIONAL COPIES OF RECORD.

A copy of the record of proceedings in court, including copies of all exhibits received in evidence or descriptions thereof (items 7(*b*) and (*d*), app. 10*b*), will be prepared for each accused.

921786°—51——35

Appendix 11

FORM FOR RECORD OF TRIAL BY SUMMARY COURT-MARTIAL

Fill in blank with numbers of pertinent charges and specifications or "all specifications and charges," as may be appropriate. For use unless departmental regulations prevent such election.

THE ACCUSED HAS BEEN PERMITTED AND HAS ELECTED TO REFUSE PUNISHMENT UNDER ARTICLE 15 AS TO

RANK AND ORGANIZATION OF OFFICER EXERCISING JURISDICTION UNDER ARTICLE 15	SIGNATURE

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL	CASE NO. 42 *(Inserted by convening authority)*

TO BE FILLED IN BY THE ACCUSED

I ☒ CONSENT ☐ OBJECT TO TRIAL BY SUMMARY COURT-MARTIAL	SIGNATURE OF ACCUSED Jack J. Johnson, Cpl

TO BE FILLED IN BY SUMMARY COURT IF APPLICABLE

When an accused has been permitted and has elected to refuse punishment under Article 15, trial by summary court-martial may proceed despite his objection.

1. THE ACCUSED, HAVING REFUSED TO CONSENT IN WRITING TO TRIAL BY SUMMARY COURT-MARTIAL AND NOT HAVING BEEN PERMITTED TO REFUSE PUNISHMENT UNDER ARTICLE 15, THE CHARGES ARE HEREWITH RETURNED TO THE CONVENING AUTHORITY.

RANK AND ORGANIZATION OF SUMMARY COURT OFFICER	SIGNATURE

2. WAS THE ACCUSED ADVISED IN ACCORDANCE WITH PARAGRAPH 79*d*, MCM, 1951? ☒ YES

SPECIFICATIONS AND CHARGES	PLEAS	FINDINGS	SENTENCE OR REMARKS
Sp. 1: Ch. I	G	G	To be confined at hard labor for one month and to forfeit $50.
Sp. 2: Ch. I	NG	G	
Ch. I	G	G	
Sp. : Ch. II	NG	NG	
Ch. II	NG	NG	
			NUMBER OF PRIOR CONVICTIONS CONSIDERED 1

PLACE Fort Dix, N. J.	DATE 31 October 1951
RANK AND ORGANIZATION OF SUMMARY COURT OFFICER CHARLES B. FOSTER, Maj, 181st Inf	SIGNATURE Charles B. Foster

Enter after signature, "Only officer present with command," if such is the case.

TO BE FILLED IN BY CONVENING AUTHORITY

ORGANIZATION Hq 181st Inf	PLACE Fort Dix, N. J.	DATE 6 November 1951

ACTION OF CONVENING AUTHORITY

Approved and ordered executed. The Post Guardhouse, Fort Dix, N. J., is designated as the place of confinement.

RANK AND ORGANIZATION OF CONVENING AUTHORITY WILLIAM H. RICHARDSON, Col, 181st Inf	SIGNATURE William H. Richardson COMMANDING

ENTERED ON APPROPRIATE PERSONNEL RECORDS IN CASE OF CONVICTION.

RANK AND DESIGNATION OF OFFICER RESPONSIBLE FOR THE ACCUSED'S RECORDS CLARENCE F. SMITH, Capt, 181st Inf Personnel Officer	SIGNATURE Clarence F. Smith

NOTE: Summary of evidence, if required by the convening or higher authority, will be attached on separate pages.

Appendix 12

TABLE OF COMMONLY INCLUDED OFFENSES

NOTE.—This table contains a list of certain principal offenses and, opposite them, certain offenses which are generally held to be lesser included therein. It is not an all inclusive list, nor can it be applied mechanically in every case. The rules with respect to lesser included offenses are stated in 158. *This table is intended as a general guide and must be used in all cases with caution.*

Attempts are not listed in the table as lesser included offenses, for an attempt to commit an offense is necessarily included in an offense charged unless the offense charged is itself an attempt (such as an assault by attempting to do bodily harm) or unless the offense charged is one which is incapable of being intentionally committed (such as involuntary manslaughter). In this connection, see 159.

The table does not include those offenses which properly may be found by means of exceptions or exceptions and substitutions (74*b*(2)), but which differ from the offenses charged only with respect to the elimination or reduction of words of aggravation. For example, depending upon the proof, desertion terminated by apprehension properly may be found as desertion terminated in a manner not specified; similarly, larceny of property of a value of more than $50 properly may be found as larceny of property of a value of $50 or less and more than $20, or of a value of $20 or less. In such a case, although the offense found would be the same offense as that charged, a lesser punishment might be authorized. In this connection, see 127*c* (Section A).

Article	*Principal Offense*	*Article*	*Lesser Included Offense*
85	Desertion with intent to remain away permanently.	86	Absence without proper authority.
85	Desertion with intent to avoid hazardous duty or shirk important service.	86	Absence without proper authority.
87	Missing movement through design.	87	Missing movement through neglect.
90	Striking his superior officer in the execution of his office.	90 128 134	Drawing or lifting up a weapon or offering violence to his superior officer in the execution of his office. Assault; assault and battery. Assault upon a commissioned officer.
90	Drawing or lifting up any weapon or offering any violence to his superior officer in the execution of his office.	128 134	Assault. Assault upon a commissioned officer.
90	Willfully disobeying a lawful order of his superior officer.	92	Failure to obey lawful order issued by the member of the armed force alleged.
91	Striking a warrant, noncommissioned, or petty officer in the execution of his office.	91 128 134	Assaulting a warrant, noncommissioned, or petty officer in the execution of his office. Assault; assault and battery. Assault upon a warrant, noncommissioned, or petty officer.

Article	*Principal Offense*	*Article*	*Lesser Included Offense*
91	Assaulting a warrant, noncommissioned, or petty officer in the execution of his office.	128 134	Assault. Assault upon a warrant, noncommissioned, or petty officer.
91	Willfully disobeying the lawful order of a warrant, noncommissioned, or petty officer.	92	Failure to obey lawful order issued by the member of the armed force alleged.
94	Mutiny.	92	Failure to obey lawful order issued by the member of the armed force alleged (when mutiny by refusal to obey orders alleged).
		116	Breach of the peace (when mutiny by violence or creating disturbance alleged).
94	Sedition.	116	Breach of the peace (when sedition by violence or creating disturbance alleged).
95	Breach of arrest.	134	Breach of restriction.
96	Suffering prisoner to escape through design.	96	Suffering prisoner to escape through neglect.
99	Running away before the enemy.	86	Absence without proper authority; goes from appointed place of duty.
99	Quitting place of duty to plunder or pillage.	86	Goes from appointed place of duty.
99	Endangering safety of command through disobedience of orders.	92	Failure to obey lawful order, as alleged.
108	Willfully damages military property.	108	Through neglect, damages military property.
108	Willfully suffers military property to be damaged.	108	Through neglect, suffers military property to be damaged.
108	Willfully destroys military property.	108	Through neglect, destroys military property; through neglect, damages military property; willfully damages military property.
108	Willfully suffers military property to be destroyed.	108	Through neglect, suffers military property to be destroyed or damaged; willfully suffers military property to be damaged.
108	Willfully loses military property.	108	Through neglect, loses military property.
108	Willfully suffers military property to be lost.	108	Through neglect, suffers military property to be lost.

Article	*Principal Offense*	*Article*	*Lesser Included Offense*
108	Willfully suffers military property to be sold.	108	Through neglect, suffers military property to be sold.
108	Willfully suffers military property to be wrongfully disposed of in a certain alleged manner.	108	Through neglect, suffers military property to be wrongfully disposed of in the manner alleged.
110	Willfully and wrongfully hazards a vessel in a certain alleged manner.	110	Negligently hazards a vessel in the manner alleged.
110	Willfully and wrongfully suffers a vessel to be hazarded in a certain alleged manner.	110	Negligently suffers a vessel to be hazarded in the manner alleged.
113	Found drunk while on post as a sentinel.	112	Drunk on duty as a member of the guard.
116	Riot.	116	Breach of the peace.
		134	Disorderly (under the circumstances alleged).
116	Breach of the peace.	134	Disorderly (under the circumstances alleged).
118	Murder, with premeditated design to kill; or murder, while engaged in perpetration of offenses listed in Article 118 (4).	118	Murder.
118	Murder, as defined in Article 118 (1), (2), (3), or (4).	119	Voluntary or involuntary manslaughter.
		128	Assault; assault and battery; aggravated assault.
		134	Assault with intent to commit murder.
		134	Assault with intent to commit voluntary manslaughter.
		134	Negligent homicide.
119	Voluntary manslaughter.	119	Involuntary manslaughter.
		128	Assault; assault and battery; aggravated assault.
		134	Assault with intent to commit voluntary manslaughter.
		134	Negligent homicide.
119	Involuntary manslaughter.	128	Assault; assault and battery.
		134	Negligent homicide.
120	Rape.	128	Assault; assault and battery.
		134	Assault with intent to commit rape; indecent assault.
121	Larceny.	121	Wrongful appropriation.

Article	Principal Offense	Article	Lesser Included Offense
122	Robbery.	121	Larceny (when proof shows taking); wrongful appropriation (when proof shows taking).
		128	Assault (when force and violence alleged).
		134	Assault with intent to rob (when force and violence alleged).
124	Maiming.	128	Assault; assault and battery; aggravated assault.
126	Aggravated arson.	126	Simple arson.
128	Assault intentionally inflicting grievous bodily harm.	128	Assault; assault and battery; assault likely to produce grievous bodily harm by means of dangerous weapon, or any other means or force, as alleged.
128	Assault with a dangerous weapon, or any other means or force likely to produce death or grievous bodily harm.	128	Assault.
128	Assault and battery.	128	Assault.
129	Burglary.	130	Housebreaking.
		134	Unlawful entry.
130	Housebreaking.	134	Unlawful entry.
131	Perjury.	134	False swearing.
134	Assault with intent to murder.	128	Assault; aggravated assault.
		134	Assault with intent to commit voluntary manslaughter.
134	Assault with intent to commit voluntary manslaughter.	128	Assault.
134	Assault with intent to commit rape.	128	Assault.
		134	Indecent assault.
134	Assault with intent to rob.	128	Assault.
134	Assault with intent to commit sodomy.	128	Assault.
134	Assault and battery upon a child under the age of 16 years.	128	Assault; assault and battery.
134	Discharging a firearm wrongfully and willfully, under such circumstances as to endanger life.	134	Discharging a firearm through carelessness.
134	Making and uttering a worthless check with intent to deceive and thereafter wrongfully and dishonorably failing to maintain a sufficient balance.	134	Making and uttering a worthless check and thereafter wrongfully and dishonorably failing to maintain a sufficient balance.

Appendix 13

FORMS OF SENTENCES

A sentence adjudged by a court-martial should follow substantially one of the following forms or any necessary modification or combination of such forms. Forfeitures, fines, and detentions will be expressed in dollars or dollars and cents. Periods of confinement should not be expressed in terms of months in excess of 11; for example, a period of 12 months is properly expressed as "one year," and a period of 1½ years is properly expressed as "one year and six months."

1. To have $———.— detained.[1]
2. To have $———.— per month for ——— months detained.[1]
3. To forfeit $———.—.[2]
4. To forfeit $———.— per month for ——— months.[2]
5. To perform hard labor for ——— (days) (months).[3]
6. To be confined at hard labor for ——— (days) (months) (years).[4]
7. To be confined at hard labor for ——— months[4] and to forfeit $———.—[2] per month for a like period.
8. To be confined [in solitary confinement] [in solitary confinement on bread and water with a full ration every (second) (third) day] [in solitary confinement on diminished rations, to wit: two full meals per day, with a full ration every (second) (third) day,] for ——— days.[5]
9. To be dishonorably discharged from the service, [(and) to forfeit all pay and allowances[6]], [and to be confined at hard labor for ——— (months) (years)].
10. *a.* To be discharged from the service with a bad conduct discharge, [(and) to forfeit $———.— per month for ——— months[7]], [and to be confined at hard labor for ——— months].

    b. To be discharged from the service with a bad conduct discharge, [(and) to forfeit all pay and allowances[6]], [and to be confined at hard labor for ——— (months) (years)].[8]
11. To be reduced to the grade of (corporal) (radioman, second class) (———).[9]
12. To be admonished.
13. To be reprimanded.
14. To be restricted to the limits of ——— for ——— months.[10]

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[1] Authorized in the case of enlisted persons only. See 126*h*(4) and 127*b*.

[2] For limitations in the case of enlisted persons, see 126*h*(2) and 127*b*.

[3] Not to exceed three months if adjudged by a general or special court-martial; and not to exceed 45 days if adjudged by a summary court-martial. See 126*c* and *k*.

[4] A single sentence adjudged against an enlisted person of an armed force of the United States which does not include dishonorable or bad conduct discharge shall not include confinement at hard labor for a period greater than six months (127*b*). See also 126*j*.

[5] Not to be imposed by courts-martial as punishment against Army or Air Force personnel. See 125 as to general limitations upon the imposition of this kind of punishment.

[6] As to the meaning of the phrase "to forfeit all pay and allowances," see 126*h*(2).

[7] A special court-martial may not adjudge forfeiture of more than two-thirds pay per month for six months, even though a bad conduct discharge is adjudged (Art. 19).

[8] See 127*c*; Article 18; Article 19.

[9] See 126*c*(2) and *e*.

[10] Not to exceed two months (126*g*).

15. To be suspended from duty for —— months.[11]

16. To be suspended from command for ——— months.[11]

17. To be suspended from rank for ——— months.[11]

18. To (lose ——— unrestricted numbers) (be placed at the foot of the ———'s list of present date and to remain there until he shall have lost ——— unrestricted numbers) (lose ——— unrestricted line officer running mate numbers).[12]

19. To lose ——— month's seniority in the date of his warrant (as machinist) (———), and to lose corresponding rank in the list of (machinists) (———) of the (Navy) (———).[13]

20. To be dismissed from the service,[14] [(and) to forfeit all pay and allowances], [and to be confined at hard labor for ——— (months) (years)].

21. To pay to the United States a fine of $———, [and to be confined at hard labor until said fine is so paid, but for not more than ——— (months) (years)].[15]

22. To pay to the United States a fine of $———, [(and) to be confined at hard labor for ——— (months) (years)], [and to be further confined at hard labor until said fine is so paid, but for not more than ——— (months) (years) in addition to the ——— (months) (years) hereinbefore adjudged].[15]

23. To be dishonorably discharged from the service, to forfeit all pay and allowances, and to be confined at hard labor for the term of his natural life.

24. To be put to death.

---

[11] See 126*i*. Authorized in the case of personnel of the Army and Air Force only.

[12] Not an authorized punishment in the case of Army and Air Force personnel (126*i*). Officers of the other armed forces may be sentenced to a loss of numbers. The sentence placing the officer at the foot of the list, with the proviso that he is to remain in that position until he has lost the required numbers, is to be used when his position on the list will not permit of his losing the adjudged numbers in grade at the time the sentence is adjudged.

[13] Not an authorized punishment in the case of Army and Air Force personnel (126*i*). In the case of warrant officers of the other armed forces, when promotion is based upon length of service in grade, loss of seniority for a specified period of time should be adjudged in lieu of a loss of numbers.

[14] Applicable in the case of commissioned officers only (126*d*).

[15] See 126*h*(3) ; 127*c*, Section B.

Appendix 14

FORMS FOR ACTION BY CONVENING AUTHORITY

Show headquarters or ship, place, and date of action. Signature is followed by rank, unit, and the words "Commanding" or "Officer in Charge." The use of these forms is not mandatory and they are not intended to provide for every case; but whenever appropriate, these forms, or a combination or modification of them, should be used.

The place of confinement should be designated only after consulting pertinent departmental regulations. See 89*c*(5).

a. SUMMARY COURTS-MARTIAL.

Forms 1–10 may be used by the convening authority who takes action on the record of trial by summary court-martial:

Approval
—Execution

1. Approved and ordered executed. (——— is designated as the place of confinement.)

—Partial

2. Finding of guilty of Specification 2, Charge I, is disapproved. Only so much of the sentence as provides for ——— is approved and ordered executed. (——— is designated as the place of confinement.)

—Of rehearing (see 89*c*(7))

3. Approved and ordered executed. The accused will be credited with any portion of the punishment served or executed from ——— 19— to ——— 19— under the sentence adjudged at the former trial of this case.

Suspension (see 88*e*(2))
—Entire sentence; conditional remission

4. Approved and suspended for ——— months, at which time, unless the suspension is sooner vacated, the sentence will be remitted without further action.

—Partial; conditional remission

5. Approved and ordered executed, but the (confinement) (   ) is suspended for ——— months, at which time, unless the suspension is sooner vacated, the sentence to ——— will be remitted without further action.

—Indefinite

6. Approved and suspended.

Disapproval
—Charges dismissed

7. Disapproved. The charges are dismissed.

—Order of rehearing

8. It appears that the following error was committed: ————. This error being materially prejudicial to the substantial rights of the accused under the circumstances of this case, the findings of guilty and the sentence are disapproved, and a rehearing is directed before a summary court-martial to be hereafter designated.

NOTE.—The reason for disapproval must be stated in the action if a rehearing is ordered (Art. 63*a*).

—Of rehearing; restoration of rights (see 89*c*(7))

9. Disapproved. The charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the execution of the sentence adjudged at the former trial of this case on ——— 19— will be restored.

NOTE.—Under the provisions of Article 75*a* the authority setting aside or disapproving a sentence must order a restoration of all rights, privileges, and property affected by any executed portion of a sentence which has been set aside or disapproved unless a rehearing is ordered and such executed portion is included in the sentence adjudged upon a rehearing.

It follows that if a rehearing of a summary court-martial case is ordered pursuant to 94*a*(2) after the original sentence has been ordered into execution, any rights, privileges, and property affected by the former sentence must be restored if the rehearing results in an acquittal or a disapproval of the sentence adjudged.

If the rehearing results in an acquittal, the convening authority should omit from the action shown above the words, "Disapproved. The charges are dismissed."

Withdrawal of previous action (see 89*b*; 94*a* (2))

10. In the foregoing case of ———, the action taken by (me) (my predecessor in command) on ——— 19— is withdrawn and the following substituted therefor: (———————————).

b. SPECIAL COURTS-MARTIAL.

Special court-martial sentences in cases which do not involve an approved sentence to bad conduct discharge.—Forms 11–26 are appropriate for use in special court-martial cases in which the sentence, as approved, does not include a bad conduct discharge. They are also appropriate for use with respect to general court-martial sentences which, as approved, do not affect a general or flag officer, or extend to death or dismissal, or include a punitive discharge or confinement for one year or more.

Approval —Execution

11. In the foregoing case of ———, the sentence is approved and will be duly executed. (——— is designated as the place of confinement.)

—Partial; execution

12. In the foregoing case of ———, only so much of the sentence as provides for ——— is approved and will be duly executed. (——— is designated as the place of confinement.)

—Partial; disapproval of findings

13. In the foregoing case of ———, the findings of guilty of Specifications 1 and 2, Charge II, are disapproved. (The sentence is approved and will be duly executed.) (Only so much of the sentence as provides for ——— is approved and will be duly executed.) (——— is designated as the place of confinement.)

—Partial; lesser included offense and substituted findings (see 87*a*(4))

14. In the foregoing case of ———, only so much of the findings of guilty of Charge I and its specification is approved as finds that the accused absented himself without proper authority from the (organization) (———) alleged at the place and time alleged and remained so absent until ———, in violation of Article 86. Only so much of the sentence as provides for ——— is approved and will be duly executed. (——— is designated as the place of confinement.)

15. In the foregoing case of ———, only so much of the finding of guilty of Specification 1 with respect to value as finds some value not in excess of ——— is approved. Only so much of the sentence as provides for ——— is approved and will be duly executed. (——— is designated as the place of confinement.)

16. In the foregoing case of ———, only so much of the finding of guilty of Specification 1, Charge I, is approved as finds that the accused did, at the time and place alleged, wrongfully appropriate the property described, of the value and ownership alleged. Only so much of the sentence as provides for ——— is approved and will be duly executed. (——— is designated as the place of confinement.)

17. In the foregoing case of ———, only so much of the findings of guilty of Charge I and its specification is approved as finds that the accused did, at the time and place alleged, willfully and maliciously attempt to set fire to a haystack, the property of ———, of some value not in excess of $20.00, in violation of Article 80. Only so much of the sentence as provides for ——— is approved and will be duly executed. (——— is designated as the place of confinement.)

—Of rehearing (see 89*c*(7))

18. In the foregoing case of ———, the sentence is approved and will be duly executed. (——— is designated as the place of confinement.) The accused will be credited with (confinement from ——— 19— to ——— 19— and) any (other) portion of the punishment served or executed from ——— 19— to ——— 19— under the sentence adjudged at the former trial of this case.

Suspension —indefinite; conditional remission (see 88*e*(2))

19. In the foregoing case of ———, the sentence is approved, but the execution thereof is (suspended) (suspended for ——— months, at which time, unless the suspension is sooner vacated, the sentence will be remitted without further action).

20. In the foregoing case of ———, the sentence is approved and will be duly executed, but the execution of that portion thereof adjudging (forfeitures of pay) (confinement) is (suspended) (suspended for ——— months, at which time, unless the suspension is sooner vacated, the suspended portion of the sentence will be remitted without further action).

Disapproval —Charges dismissed

21. In the foregoing case of ———, the sentence is disapproved and the charges are dismissed.

—Reason stated (see 89*c*(2))

22. In the foregoing case of ———, it appears from the record of trial that, although trial of the specification of the charge was barred under the provisions of Article 43, the accused was not advised of his rights in the premises. The findings of guilty and the sentence are disapproved and the charges are dismissed.

NOTE.—Under the provisions of 89*c*(2) the convening authority should state the reasons for disapproval of the findings and sentence in certain cases even when he does not order a rehearing. Such statement of reasons for disapproval is generally appropriate where the disapproval of a finding of guilty may affect future administrative action, for example, when a finding of guilty of desertion is disapproved; or where the reason for disapproval is the insanity of the accused or the bar of the statute of limitations. Additional requirements for such statement may be prescribed by departmental regulations.

—Of rehearing; restoration of rights (see 89*c*(7))

23. In the foregoing case of ———, the findings of guilty and the sentence are disapproved and the charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the execution of the sentence adjudged at the former trial of this case on ——— 19— will be restored.

NOTE.—See also note under form 9.

—Order of rehearing (see 92)

24. In the foregoing case of ———, it appears from the record of trial that (the confession of the accused was not shown to have been voluntarily made) (Exhibit 1, an improperly authenticated extract copy of a morning report, was erroneously received in evidence over the objection of the defense) (the prosecution

erroneously cross-examined the accused on the merits after he had taken the stand for a limited purpose only) (the testimony of A as to the out of court identification of the accused by B was erroneously received in evidence) ( ). Under the circumstances of this case, this error is materially prejudicial to the substantial rights of the accused. For this reason, the sentence is disapproved and a rehearing is ordered before another court-martial to be hereafter designated.

Jurisdictional error (see 92)

25. In the foregoing case of ———, it appears from the record of trial that (the person who signed the charges sat as a member of the court) (an enlisted person who is a member of the same unit as the accused sat as a member of the court) (the members of the court-martial who tried the case were not sworn) (the specification of the charge fails to allege any offense) ( ). In view of the provisions of Article ——— the proceedings, findings, and sentence are invalid. Another trial is ordered before another court-martial to be hereafter designated.

Withdrawal of previous action (see 89*b*)

26. See form 10.

Sentences including an approved sentence to bad conduct discharge.—Forms 27–33 are applicable to cases tried by special courts-martial convened by an officer who does not exercise general court-martial jurisdiction when the sentence as approved includes a bad conduct discharge.

Approval
—Forwarding under Article 65*b*

27. In the foregoing case of ———, (the sentence) (only so much of the sentence as provides for bad conduct discharge and ———) is approved. The record of trial is forwarded for action under Article 65*b*.

—Forfeitures and confinement

NOTE.—When confinement, not suspended, is approved together with forfeitures, the forfeitures apply to pay and allowances becoming due on and after the date of the action of the convening authority unless he defers such application for good cause (88*e*(2)(*c*); Art. 57*a*). For the purpose of clarity, if confinement, unsuspended, and forfeitures are approved one of the following should be added to the form of action:

"The forfeitures shall apply to pay becoming due on and after the date of this action," or

"The application of the forfeitures is deferred until the sentence is ordered into execution."

Suspension
—Of bad conduct discharge (see 88*e*(2)(*b*))

28. In the foregoing case of ———, the sentence is approved and will be duly executed, but the execution of that portion thereof adjudging bad conduct discharge is suspended (until the accused's release from confinement or until the completion of appellate review, whichever is the later date) (for the period of confinement and ——— months thereafter, at which time, unless the suspension is sooner vacated, the bad conduct discharge shall be remitted without further action). (——— is designated as the place of confinement.) The record of trial is forwarded for action under Article 65*b*.

—Entire sentence

29. In the foregoing case of ——, the sentence is approved, but the execution thereof is suspended (for ——— months, at which time, unless the suspension is sooner vacated, it shall be

remitted without further action). The record of trial is forwarded for action under Article 65*b*.

Action by officer exercising general court-martial jurisdiction

NOTE.—The officer exercising general court-martial jurisdiction to whom the record of trial is forwarded under Article 65*b* may, in general, use the forms of actions indicated in forms 34–40 below except that, if the convening authority has modified or suspended the sentence, the superior should refer to the sentence as approved in the manner indicated in form 30.

—Approval

30. In the foregoing case of ———, the (sentence) (only so much of the sentence) as (approved) (suspended) (approved and suspended) by the convening authority (as provides for ———) is (approved ———) ( ).

—Disapproval of sentence ordered into execution by convening authority

31. In the foregoing case of ———, the findings of guilty and the sentence as approved by the convening authority are disapproved and the charges are dismissed. The accused will be released from the confinement adjudged by the sentence in this case and all rights, privileges, and property of which the accused has been deprived by virtue of the findings and sentence so disapproved will be restored.

—Disapproval; order of rehearing

32. See 24 above.

—Disapproval of rehearing

33. See 23 above.

c. GENERAL COURTS-MARTIAL.

Cases forwarded for examination under Article 69.—Forms of action 11–26 above are generally applicable to general court-martial cases in which the sentence as approved does not affect a general or flag officer, extend to death, dismissal, dishonorable or bad conduct discharge, or confinement for one year or more.

Cases forwarded for review by a board of review.

Approval

34. In the foregoing case of ———, the sentence is approved.

—Confinement and forfeitures (see 88*e*(2)(c))

NOTE.—For the purpose of clarity, if confinement, unsuspended, and forfeitures are approved, one of the following should be added at this point:

(*a*) "The forfeitures shall apply to pay and allowances becoming due on and after date of this action," or

(*b*) "The application of the forfeitures is deferred until the sentence is ordered into execution."

—Remarks as to forwarding

—Temporary custody

The record of trial is forwarded to the (Judge Advocate General of the ———) (General Counsel of the Treasury Department) for review by a board of review. Pending completion of appellate review the accused will be (retained in this command) (confined in ———) (transferred to the command of ———).

NOTE.—The command designated should be one commanded by an officer exercising general court-martial jurisdiction.

—Partial

35. In the foregoing case of ———, only so much of the sentence as provides for ——— is approved. (The forfeitures shall apply to pay and allowances becoming due on and after the date of this action.) (The application of the forfeitures is deferred until the sentence is ordered into execution.) The record of trial is forwarded to the (Judge Advocate General of the ———) (General Counsel of the Treasury Department) for review by a

board of review. Pending completion of appellate review the accused will be ——— (see form 34 above).

NOTE.—See forms 13–16 for other examples of partial approval.

—Mitigation of dishonorable discharge

36. In the foregoing case of ———, only so much of the sentence is approved as provides for bad conduct discharge, confinement at hard labor for one year, and forfeiture of all pay and allowances. The forfeitures shall apply to all pay and allowances becoming due on and after the date of this action. The record of trial is forwarded to the (Judge Advocate General of the ———) (General Counsel of the Treasury Department) for review by a board of review. Pending completion of appellate review ——— (see form 34 above).

—Recommendation for commutation

37. In the foregoing case of ———, only so much of the findings of guilty of Charge I and its specification is approved as finds the accused guilty of the specification in violation of Article 134. The sentence is approved, but it is recommended that the dismissal be commuted to ———. The record of trial is forwarded to the (Judge Advocate General of the ———) (General Counsel of the Treasury Department) for review by a board of review. Pending completion of appellate review the accused will be ——— (see form 34 above).

—Of rehearing

38. In the foregoing case of ———, the sentence is approved. The accused will be credited with (confinement from ——— 19— to ——— 19— and) any (other) portion of the punishment served or executed from ——— 19— to ——— 19— under the sentence adjudged at the former trial of this case. The record of trial is forwarded to the (Judge Advocate General of the ———) (General Counsel of the Treasury Department) for review by a board of review. Pending completion of appellate review the accused will be ——— (see form 34 above).

Suspension
—Punitive discharge; confinement for less than one year

39. In the foregoing case of ———, the sentence is approved and will be duly executed, but the execution of that portion thereof adjudging (dishonorable discharge) (bad conduct discharge) is (suspended until the accused's release from confinement or until completion of appellate review, whichever is the later date) (suspended for the period of confinement and ——— months thereafter, at which time, unless the suspension is sooner vacated, the suspended portion shall be remitted without further action). ——— is designated as the place of confinement. The record of trial is forwarded to the (Judge Advocate General of the ———) (General Counsel of the Treasury Department) for review by a board of review.

—Entire sentence

40. In the foregoing case of ———, the sentence is approved, but the execution thereof is (suspended) (suspended for ——— years, at which time, unless the suspension is sooner vacated, the sentence shall be remitted without further action). The record of trial is forwarded to the (Judge Advocate General of the ———) (General Counsel of the Treasury Department) for review by a board of review. Pending completion of appellate review the accused will be (retained in this command) (   ).

Appendix 15

FORMS FOR COURT-MARTIAL ORDERS

a. FORMS FOR INITIAL PROMULGATING ORDERS.

The following form is applicable in promulgating the results of trial and the action of the convening authority in all general and special court-martial cases. Omit the marginal side notes in drafting orders.

General (Special) Court-Martial } (Headquarters) (U. S. S.) —— **Heading**
Order No. ——— } ———— 19—

Before a general (special) court-martial which convened at (on board) ———— (pursuant to ———— **Authority**
(Place) (Description of appointing
————, (as amended by ————
orders)
————,)
(Description of amending orders, if any)

was arraigned and tried [on a (rehearing) (new trial), the former proceedings having been published in —CMO No. ————, **Arraignment**
————, ———— 19—]:
(Hq) (U. S. S.)

———— ———— ———— ———— **Accused**
(Rank or grade) (Name) (Service No.) (Armed force)
————
(Unit)

Charge I: Violation of the Uniform Code of Military Justice, Article ———. **Charges**

Specification 1: (Set forth specification verbatim from the charge sheet—or as amended during trial—unless it was withdrawn by the convening authority before arraignment. Such withdrawal may be shown as follows:

Withdrawn by order of the convening authority before arraignment.)

Specification 2: ————

Charge II: Violation of the Uniform Code of Military Justice, Article ———.

Specification: ————

PLEAS

Pleas

To *Specification* 1, Charge I: Not guilty.
To *Specification* 2, Charge I: Guilty.
To Charge I: Guilty.
To the *Specification*, Charge II: Not guilty.
To Charge II: Not guilty.

or

To all the *Specifications* and Charges: Not guilty (Guilty).

NOTE.—If a plea is not entered to a specification or charge owing, for example, to the fact that the court sustained a motion to dismiss, the **Charges dismissed on motion** fact will be briefly stated under "Pleas," as shown in the following example. In such a case the specification or charge need not be listed under "Findings."

To *Specification* 2, Charge I: Dismissed on motion of defense on ground of former jeopardy.

Findings

FINDINGS

Of *Specification* 1, Charge I: Guilty.
Of *Specification* 2, Charge I: Guilty.
Of Charge I: Guilty.
Of the *Specification*, Charge II: Not guilty.
Of Charge II: Not guilty.

or

Of all the *Specifications* and Charges: Guilty.

NOTE.—If a specification or charge is dismissed or withdrawn after a plea has been entered, the fact will be stated under "Findings." If dismissed on motion of the prosecution or withdrawn by the convening authority after evidence on the merits had been received, a notation to this effect should be made setting forth the reasons for such dismissal or withdrawal. Examples:

Of *Specification* 1, Charge I: Motion for finding of not guilty sustained.
Of *Specification* 2, Charge I: Dismissed on motion of defense on grounds of *res judicata*.
Of the *Specification* of the Charge: Withdrawn by order of the convening authority after evidence on the merits had been received because of military necessity occasioned by enemy action.

Acquittal

In the event of findings of not guilty of all charges and specifications:
Of all the *Specifications* and Charges: Not guilty.
The findings were announced on ——— 19—.

Sentence

SENTENCE

To be discharged from the service with a bad conduct discharge, to forfeit $——— pay per month for six months, and to be confined at hard labor for ———. (——— previous convictions considered.)

Date

The sentence was adjudged on ———.

ACTION

Action of convening authority

(Copy action of convening authority verbatim, including heading, date, and signature. See appendix 14 for appropriate forms.)

Action of the officer exercising general court-martial jurisdiction (if appropriate)

ACTION OF THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION

HEADQUARTERS

____

____

——— 19—

In the foregoing case of ——— the sentence as approved (and suspended) by the convening authority is approved. The record of trial is forwarded to the Judge Advocate General of the ——— for review by a board of review. Pending completion of appellate review the accused will be confined in —————.

Major General, U S ———
Commanding

NOTE.—Orders promulgating the proceedings of special court-martial cases, which include an approved sentence to bad conduct discharge will be published by the officer who forwards the record of trial to the Judge Advocate General. If the record is so forwarded by an officer exercising general court-martial jurisdiction to whom the record has been forwarded pursuant to Article 65*b*, his action will be copied verbatim immediately after the action of the convening authority.

Authentication

NOTE.—The order will be authenticated as provided in departmental regulations.

Joint or common trials

NOTE.—In the case of a *joint or common* trial separate orders should be issued for each accused. Joint specifications will be copied verbatim but only the pleas, findings, sentence, and action pertaining to the accused as to whom the order is promulgated need be shown.

b. FORMS FOR SUPPLEMENTARY ORDERS PROMULGATING RESULTS OF AFFIRMING ACTION.

NOTE.—Court-martial orders publishing the final results of a new trial and of proceedings in cases in which the President or the Secretary of a Department has taken final action are promulgated by departmental orders. In other cases the final action pursuant to affirmation by a board of review or the Court of Military Appeals may be promulgated, as may be appropriate under the circumstances, by the convening authority, or by an officer exercising general court-martial jurisdiction over the accused at the time of final action, or by the Secretary of the Department. See 107. The following forms may be used where such a promulgating order is published in the field. If a sentence *as ordered into execution or suspended* by the convening authority is affirmed without modification, no supplementary promulgating order is required.

Heading

See *a* above.

Sentence —Affirmed

In the (general) (special) court-martial case of ———, the sentence to bad conduct discharge, forfeiture of ——— ———, and confinement at hard labor for ———, as promulgated in (General) (Special) Court-Martial Order No. ———, (Headquarters) (U. S. S.) ———, dated ——— 19—, has been affirmed pursuant to Article (66) (67). The provisions of Article 71c having been complied with, the sentence will be duly executed. (——— is designated as the place of confinement.) (———.)

NOTE.—As to the designation of places of confinement, see the applicable departmental regulations.

or

—Affirmed in part

In the (general) (special) court-martial case of ———, only so much of the sentence promulgated in (General) (Special) Court-Martial Order No. ———, (Headquarters) (U. S. S.) ———, dated ——— 19—, as provides for ———, has been affirmed pursuant to Article (66) (67). The provisions of Article 71c having been complied with, the sentence as thus modified will be duly executed. (——— is designated as the place of confinement.) (———.)

or

In the (general) (special) court-martial case of ———, pursuant to Article (66) (67), the findings of guilty of Charge II and its specification have been set aside and only so much of the sentence promulgated in (General) (Special) Court-Martial Order No. ———, (Headquarters) (U. S. S.) ———, dated ——— 19—, as provides for ——— has been affirmed. Article 71*c* having been complied with, the sentence as thus modified will be duly executed. (——— is designated as the place of confinement.) (———.)

or

—Affirmed in part; prior order of execution set aside in part

In the (general) (special) court-martial case of ———, the proceedings of which were promulgated in (General) (Special) Court-Martial Order No. ———, (Headquarters) (U. S. S.) ———, dated ——— 19—, the findings of guilty of Charge I and its specification, and so much of the sentence as is in excess of ——— have been set aside and the sentence, as thus modified, has been affirmed pursuant to Article (66) (67). Article 71*c* having been complied with, all rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and that portion of the sentence so set aside will be restored.

or

Findings and sentence set aside

—Charges dismissed

—Rights restored

—Rehearing ordered

In the (general) (special) court-martial case of ———, pursuant to Article (66) (67), the findings of guilty and the sentence as promulgated by (General) (Special) Court-Martial Order No. ———, (Headquarters) (U. S. S.) ———, dated ——— 19—, were set aside on ——— 19—. (The charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and the sentence so set aside will be restored.) (A rehearing is ordered before another court-martial to be hereafter designated.)

Authentication See *a* above.

c. FORMS FOR ORDERS REMITTING OR SUSPENDING UNEXECUTED PORTIONS OF SENTENCE.

Heading See *a* above.

Remission; suspension (see 97*a*)

The unexecuted portion of the sentence to ———, in the case of ———, promulgated in Special Court-Martial Order No. ———, (this headquarters) (this ship) (Headquarters ———) (U. S. S. ———), ——— 19—, is (remitted) (suspended) (suspended for ——— months, at which time, unless the suspension is sooner vacated, the unexecuted portion of the sentence will be remitted without further action).

Summary courts-martial

NOTE.—Any order remitting or suspending the unexecuted portion of a sentence by summary court-martial or promulgating any other action taken on a summary court-martial case subsequent to the initial action of the convening authority will be promulgated in such orders as may be prescribed by departmental regulations.

Authentication See *a* above.

d. FORMS FOR ORDERS SETTING ASIDE ILLEGAL SENTENCE.

Heading

See *a* above.

Setting aside —By officer having supervisory authority —Entire sentence

Pursuant to the authority of pargaraph 94, MCM, 1951, the findings of guilty and the sentence in the special court-martial case of ———, as promulgated in Special Court-Martial Order No. ———, (Headquarters) (U. S. S.) ———, ——— 19—, are set aside. All rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and the sentence so set aside will be restored.

or

—In part

Pursuant to the authority of paragraph 94, MCM, 1951, the findings of guilty of Charge I and its specification and so much of the sentence as is in excess of ———, in the special court-martial case of ———, as promulgated in Special Court-Martial Order No. ———, (Headquarters) (U. S. S.) ———, ——— 19—, are set aside. All rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and that portion of the sentence so set aside will be restored.

—By convening authority

NOTE.—If, pursuant to 94*a* (2), the convening authority withdraws his previous action, disapproves the findings of guilty and the sentence, and dismisses the charge or directs a rehearing in a case in which a promulgating order of execution has previously been published, he shall publish a new promulgating order as shown in *a* above. The action shall be followed by the following notation:

—Revocation of prior order

Special Court-Martial Order No. ———, this (headquarters) (ship), ——— 19—, is rescinded.

Authentication

See *a* above.

e. FORMS FOR ORDERS VACATING SUSPENSION.

NOTE.—Orders promulgating the vacation of the suspension of a dismissal will be published by departmental orders. Vacations of any other suspension of a general court-martial sentence, or of a special court-martial sentence which as approved and affirmed includes a bad conduct discharge, will be promulgated by the officer exercising general court-martial jurisdiction over the probationer (Art. 72*b*). The vacation of suspension of any other sentence may be promulgated by the officer who took action under Article 72*c*. See 97*b*.

Heading

See *a* above.

Vacation of suspension —Under Article 72c

So much of the order published in Special Court-Martial Order No. ———, this (headquarters) (ship), ——— 19—, as suspends execution of the sentence to (confinement) (forfeiture of pay) (———) in the case of ——— is vacated. The unexecuted portion of the sentence to ——— will be duly executed.

—General court-martial sentence forwarded for examination under Article 69

So much of the order published in General Court-Martial Order No. ———, this headquarters, dated ——— 19—, as suspends execution of the sentence in the case of ——— is vacated pursuant to Article 72. The sentence will be carried into execution.

—Sentence including a punitive discharge or confinement for one year or more

So much of the order published in (General) (Special) Court-Martial Order No. ———, this headquarters, dated ——— 19—, as suspends execution of the sentence to (dishonorable discharge) (bad conduct discharge) (———) in the case of ——— is vacated pursuant to Article 72. Article 71*c* having been complied with, the sentence to ——— will be duly executed.

Authentication

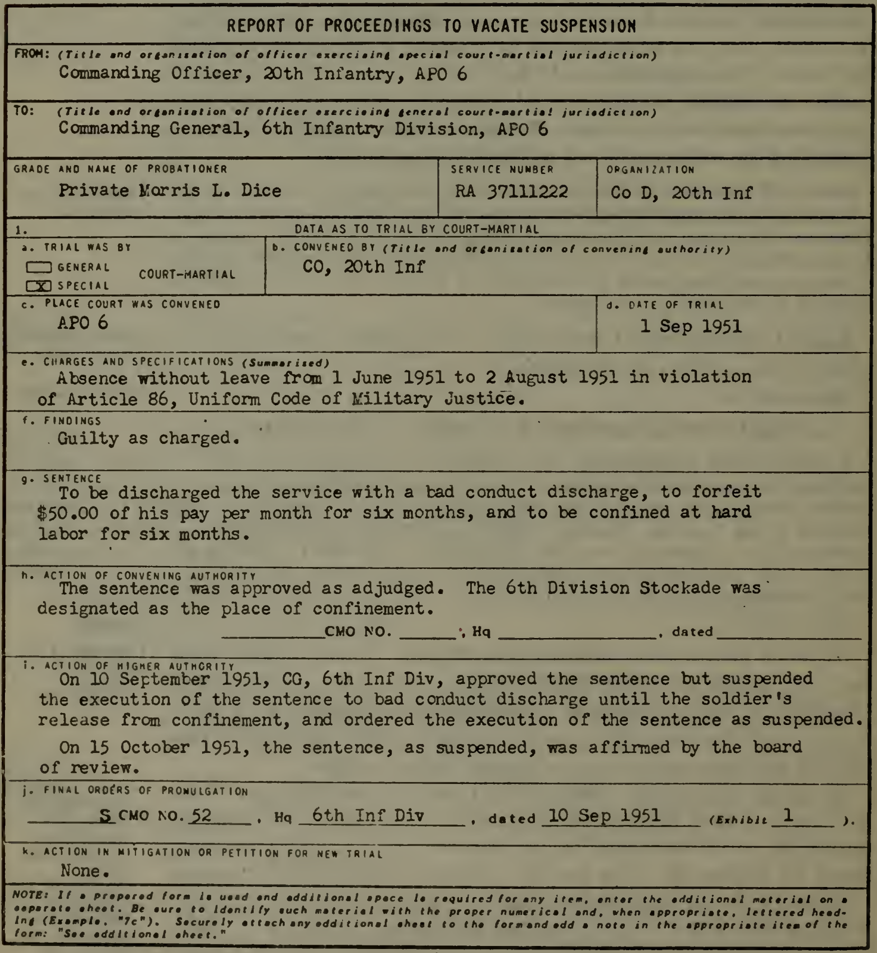
See *a* above.

Appendix 16

REPORT OF PROCEEDINGS TO VACATE SUSPENSION

There is set forth below a copy of the form for the report of proceedings to vacate suspension required under the provisions of Article 72. The officer exercising special court-martial jurisdiction over the probationer may either hold the entire hearing himself or designate a qualified officer to conduct a preliminary hearing subject to review by the officer exercising special court-martial jurisdiction. If such a preliminary hearing is held, the probationer will be given an opportunity to examine the report of proceedings and to present any objections to the officer exercising special court-martial jurisdiction. The probationer, if he so desires, shall be represented by counsel at both the preliminary and final hearings.

As a guide, sample entries pertaining to a member of the Army have been entered. Items 1 to 14, inclusive, may be completed by an officer designated to hold a preliminary hearing who shall affix his signature in space 15.



REPORT OF PROCEEDINGS TO VACATE SUSPENSION

FROM: *(Title and organization of officer exercising special court-martial jurisdiction)*
Commanding Officer, 20th Infantry, APO 6

TO: *(Title and organization of officer exercising general court-martial jurisdiction)*
Commanding General, 6th Infantry Division, APO 6

GRADE AND NAME OF PROBATIONER Private Morris L. Dice	SERVICE NUMBER RA 37111222	ORGANIZATION Co D, 20th Inf

1. DATA AS TO TRIAL BY COURT-MARTIAL

a. TRIAL WAS BY ☐ GENERAL ☒ SPECIAL COURT-MARTIAL

b. CONVENED BY *(Title and organization of convening authority)*
CO, 20th Inf

c. PLACE COURT WAS CONVENED
APO 6

d. DATE OF TRIAL
1 Sep 1951

e. CHARGES AND SPECIFICATIONS *(Summarized)*
Absence without leave from 1 June 1951 to 2 August 1951 in violation of Article 86, Uniform Code of Military Justice.

f. FINDINGS
Guilty as charged.

g. SENTENCE
To be discharged the service with a bad conduct discharge, to forfeit $50.00 of his pay per month for six months, and to be confined at hard labor for six months.

h. ACTION OF CONVENING AUTHORITY
The sentence was approved as adjudged. The 6th Division Stockade was designated as the place of confinement.
________ CMO NO. ______, Hq ____________, dated ____________

i. ACTION OF HIGHER AUTHORITY
On 10 September 1951, CG, 6th Inf Div, approved the sentence but suspended the execution of the sentence to bad conduct discharge until the soldier's release from confinement, and ordered the execution of the sentence as suspended.

On 15 October 1951, the sentence, as suspended, was affirmed by the board of review.

j. FINAL ORDERS OF PROMULGATION
S CMO NO. 52, Hq 6th Inf Div, dated 10 Sep 1951 *(Exhibit* 1 *).*

k. ACTION IN MITIGATION OR PETITION FOR NEW TRIAL
None.

NOTE: If a prepared form is used and additional space is required for any item, enter the additional material on a separate sheet. Be sure to identify such material with the proper numerical and, when appropriate, lettered heading (Example, "7c"). Securely attach any additional sheet to the form and add a note in the appropriate item of the form: "See additional sheet."

2. ALLEGED VIOLATION OF PROBATION *(Brief statement of alleged misconduct and date)*

Information indicates misconduct on the part of Pvt Dice subsequent to the foregoing sentence by special court-martial, viz., escape from confinement on or about 10 November 1951, in violation of Article 95, as alleged in the charges attached hereto (Exhibit 2).

Check Appropriate Answer	YES	NO
3. PURSUANT TO THE PROVISIONS OF ARTICLE 72, UNIFORM CODE OF MILITARY JUSTICE, AND PARAGRAPH 97*b*, MANUAL FOR COURTS-MARTIAL, 1951, A HEARING WAS HELD ON THE ALLEGED VIOLATION OF PROBATION.	X	
4. AT THE OUTSET OF THE HEARING THE PROBATIONER WAS ADVISED:		
a. OF THE NATURE OF THE ALLEGED VIOLATION OF PROBATION.	X	
b. OF THE NAME OF THE PERSON ALLEGING THE VIOLATION OF PROBATION.	X	
c. OF THE NAMES OF THE WITNESSES AGAINST HIM SO FAR AS KNOWN.	X	
d. THAT A HEARING AS TO THE ALLEGED VIOLATION OF PROBATION WAS ABOUT TO BE HELD.	X	
e. OF HIS RIGHT, UPON HIS REQUEST, TO HAVE COUNSEL REPRESENT HIM AT THE HEARING, EITHER		
(1) CIVILIAN COUNSEL, IF PROVIDED BY HIM, OR	X	
(2) MILITARY COUNSEL OF HIS OWN SELECTION, IF SUCH COUNSEL BE REASONABLY AVAILABLE, OR	X	
(3) COUNSEL APPOINTED BY AN OFFICER EXERCISING SPECIAL COURT-MARTIAL JURISDICTION OVER THE COMMAND.	X	
f. OF HIS RIGHT TO CROSS-EXAMINE ALL AVAILABLE WITNESSES AGAINST HIM.	X	
g. OF HIS RIGHT TO PRESENT ANYTHING HE MIGHT DESIRE ON HIS OWN BEHALF, EITHER IN DEFENSE OR MITIGATION.	X	
h. OF HIS RIGHT TO HAVE THE OFFICER CONDUCTING THE HEARING EXAMINE AVAILABLE WITNESSES REQUESTED BY HIM.	X	
i. OF HIS RIGHT TO MAKE A STATEMENT IN ANY FORM.	X	
j. THAT HE WAS NOT REQUIRED TO MAKE ANY STATEMENT REGARDING THE ALLEGED VIOLATION OF PROBATION.	X	
k. THAT ANY STATEMENT MADE BY HIM MIGHT BE USED AS EVIDENCE AGAINST HIM.	X	
5. a. THE PROBATIONER REQUESTED COUNSEL.	X	
b. NAME *(and rank)* OF REQUESTED COUNSEL John Doe, 1st Lt ORGANIZATION OR ADDRESS Hq 6th Inf Div		
c. COUNSEL REQUESTED BY THE PROBATIONER WAS REASONABLY AVAILABLE.	X	
d. NAME *(and rank)* OF COUNSEL MADE AVAILABLE BY AN OFFICER EXERCISING SPECIAL COURT-MARTIAL JURISDICTION OVER THE COMMAND None. ORGANIZATION OR ADDRESS —		
e. COUNSEL REQUESTED BY OR MADE AVAILABLE TO THE PROBATIONER WAS PRESENT AS COUNSEL THROUGHOUT THE HEARING. *(If the probationer waives the right to have counsel present throughout all or a part of the investigation after having requested counsel, state the circumstances and the particular proceedings conducted in the absence of such counsel.)*	X	
6. a. THE PROBATIONER WAS AFFORDED THE OPPORTUNITY TO OBTAIN AVAILABLE WITNESSES REQUESTED BY HIM AND TO CROSS-EXAMINE ALL AVAILABLE WITNESSES.	X	
b. IN THE PRESENCE OF THE PROBATIONER ALL AVAILABLE WITNESSES AND DOCUMENTARY EVIDENCE ON BOTH SIDES WERE EXAMINED.	X	
c. THE MATERIAL TESTIMONY GIVEN BY EACH SUCH WITNESS UNDER DIRECT AND CROSS-EXAMINATION WAS REDUCED TO A WRITTEN STATEMENT EMBODYING THE SUBSTANCE OF THE TESTIMONY TAKEN ON BOTH SIDES.	X	
d. THE WRITTEN STATEMENTS OF SUCH WITNESSES ARE APPENDED HERETO AS INDICATED:	X	

NAME *(and grade)* OF WITNESSES WHO WERE PRESENT	ORGANIZATION OR ADDRESS	EXHIBIT NO.
Richard L. Smith, 1st Lt	Hq 20th Inf	3
Lewis Banter, Sgt	Co D, 20th Inf	4
William Long, Rct	Co A, 20th Inf	5

(Continued) Check Appropriate Answer			YES	NO
7. a. THE SUBSTANCE OF THE EXPECTED TESTIMONY OF EACH OF THE FOLLOWING ABSENT WITNESSES, WHOSE PRESENCE WAS NOT REQUESTED BY THE PROBATIONER, OR WHO HAVING BEEN REQUESTED WERE NOT AVAILABLE OR IN REGARD TO WHOM THE REQUEST WAS WITHDRAWN, HAS BEEN REDUCED TO A WRITTEN STATEMENT WHICH IS APPENDED HERETO AS INDICATED:				
NAME *(and grade)* OF ABSENT WITNESSES	ORGANIZATION OR ADDRESS	EXHIBIT NO.		
None.	None.	None.		
b. A COPY OF EACH SUCH WRITTEN STATEMENT HAS BEEN SHOWN TO THE PROBATIONER.				X
c. IF AN ABSENT WITNESS IS REQUESTED BY THE PROBATIONER BUT IS NOT AVAILABLE, ENTER A PROPER EXPLANATION. None.				
8. THE FOLLOWING DOCUMENTS HAVE BEEN EXAMINED, SHOWN TO THE PROBATIONER, AND ARE APPENDED AS INDICATED *(describe documents)*:		EXHIBIT NO.	X	
SCMO No. 52, Hq 6th Inf Div, 10 Sep 1951.		1	X	
Extract copy of morning report, Co D, 20th Inf, for 2 Aug 1951.		6	X	
Extract copy of morning report, Co D, 20th Inf, for 10 Sep 1951.		7	X	
Extract copy of guard report, Hq Special Troops, 6th Inf Div, for 10 Nov 1951.		8	X	
9. THE FOLLOWING REAL EVIDENCE WAS EXAMINED, SHOWN TO THE PROBATIONER, AND IS NOW PRESERVED FOR SAFE KEEPING AS INDICATED:			X	
Hacksaw blade—retained in custody of the adjutant, 20th Inf.			X	
IF CERTAIN REAL EVIDENCE WHICH WAS EXAMINED WAS NOT SHOWN TO THE PROBATIONER, STATE THE REASONS.				
10. THE PROBATIONER AFTER HAVING BEEN INFORMED OF HIS RIGHT TO MAKE A STATEMENT OR REMAIN SILENT:				
a. STATED THAT HE DID NOT DESIRE TO MAKE A STATEMENT.			X	
b. MADE A STATEMENT APPENDED HERETO *(Exhibit)*.				X
11. a. THERE ARE REASONABLE GROUNDS FOR A BELIEF THAT THE PROBATIONER IS NOW, OR WAS AT THE TIME OF THE COMMISSION OF THE ALLEGED VIOLATION OF PROBATION, MENTALLY DEFECTIVE, DISEASED, OR DERANGED.				X
b. IF THERE ARE GROUNDS FOR SUCH A BELIEF, STATE REASONS THEREFOR AND ACTION TAKEN. None.				
c. A REPORT OF A *(board of medical officers) (psychiatrist)* IS APPENDED *(Exhibit)*.				X
12. EXPLANATORY OR EXTENUATING CIRCUMSTANCES Prior to his escape and since his return to military control, the probationer's conduct while in confinement has been satisfactory. His escape may have been attributable to the influence of a fellow prisoner. Information indicates that the probationer is easily led, particularly in matters tending toward the breach of discipline and violation of law.				
13. REHABILITATION IS BELIEVED LIKELY.				X

14. PERSONAL DATA

a. PRESENT AGE 22 6/12	b. BASIC PAY PER MONTH $90	c. ALLOTMENTS PER MONTH None.
d. INITIAL DATE AND TERM OF CURRENT SERVICE Enlisted 15 March 1949 for three years.		

e. PRIOR SERVICE *(As to each terminated enlistment give inclusive dates of service and organization in which serving at termination. Give similar data as to service not under an enlistment.)*

No prior service.

f. CHARACTER OF SERVICE PRIOR TO OFFENSE OF WHICH CONVICTED Satisfactory.	g. CHARACTER OF SERVICE WHILE ON PROBATION, PRIOR TO ALLEGED VIOLATION OF PROBATION Satisfactory.
h. PREVIOUS CONVICTIONS WHETHER OR NOT CONSIDERED AT TRIAL None.	i. INTELLIGENCE SCORE 83

j. CIVILIAN BACKGROUND

MARITAL STATUS ☐ MARRIED ☒ SINGLE	NUMBER OF DEPENDENTS None.

EDUCATION

Completed 9 years of school.

EMPLOYMENT

Unskilled laborer in a rubber factory earning about $45 per week.

CRIMINAL RECORD

Evidence of none.

EXPLANATORY COMMENTS

A personal interview with the probationer after sentence by court-martial disclosed that his father died when he was 16. His mother, two brothers, and one sister live in Akron, Ohio.

k. MILITARY RECORD *(Brief statement of training, combat, awards, decorations, delinquencies, etc.)*

After enlisting on 15 March 1949, probationer received basic training at Fort Jackson, S.C. On 1 August 1949 he was assigned to the 20th Infantry. His service record contains "Satisfactory" ratings both as to efficiency and character. At his trial he testified that he absented himself without leave in order to be near his mother who was seriously ill. This statement was corroborated by affidavits of friends of the family and the family physician.

15. TYPED NAME, RANK, AND ORGANIZATION OF OFFICER CONDUCTING HEARING *(If other than officer exercising special court-martial jurisdiction)* [1] RICHARD T. JOHNSON, Major, 20th Inf	DATE 1 Dec 1951 SIGNATURE Richard T. Johnson

[1] *Applicable only if a preliminary hearing is conducted by an officer other than the officer exercising special court-martial jurisdiction. In appropriate cases, enter "Not applicable."*

16. HEARING BEFORE OFFICER EXERCISING SPECIAL COURT-MARTIAL JURISDICTION[1]

The foregoing report of proceedings of the preliminary hearing has been submitted to the probationer *(and his counsel)*[2]. The probationer *(and his counsel)*[2] appeared before me and was (were) given an opportunity to object to any item in the report and to submit any additional matter in extenuation, mitigation, or defense. Any objections and other matters submitted by him are ~~set forth below~~ *(Appended as Exhibit No.* 9 *).*[2]

17. RECOMMENDATION OF OFFICER EXERCISING SPECIAL COURT-MARTIAL JURISDICTION

IT IS RECOMMENDED THAT THE FOLLOWING DISPOSITION BE MADE OF THIS CASE *(Check appropriate entry or entries)*:

a. ☒ THAT THE SUSPENSION OF THE SENTENCE TO bad conduct discharge BE VACATED.

b. ☒ THAT THE UNEXECUTED PORTION OF THE SENTENCE BE CARRIED INTO EXECUTION.

c. ☐ THAT THE PROCEEDINGS TO VACATE THE SUSPENSION BE DROPPED.

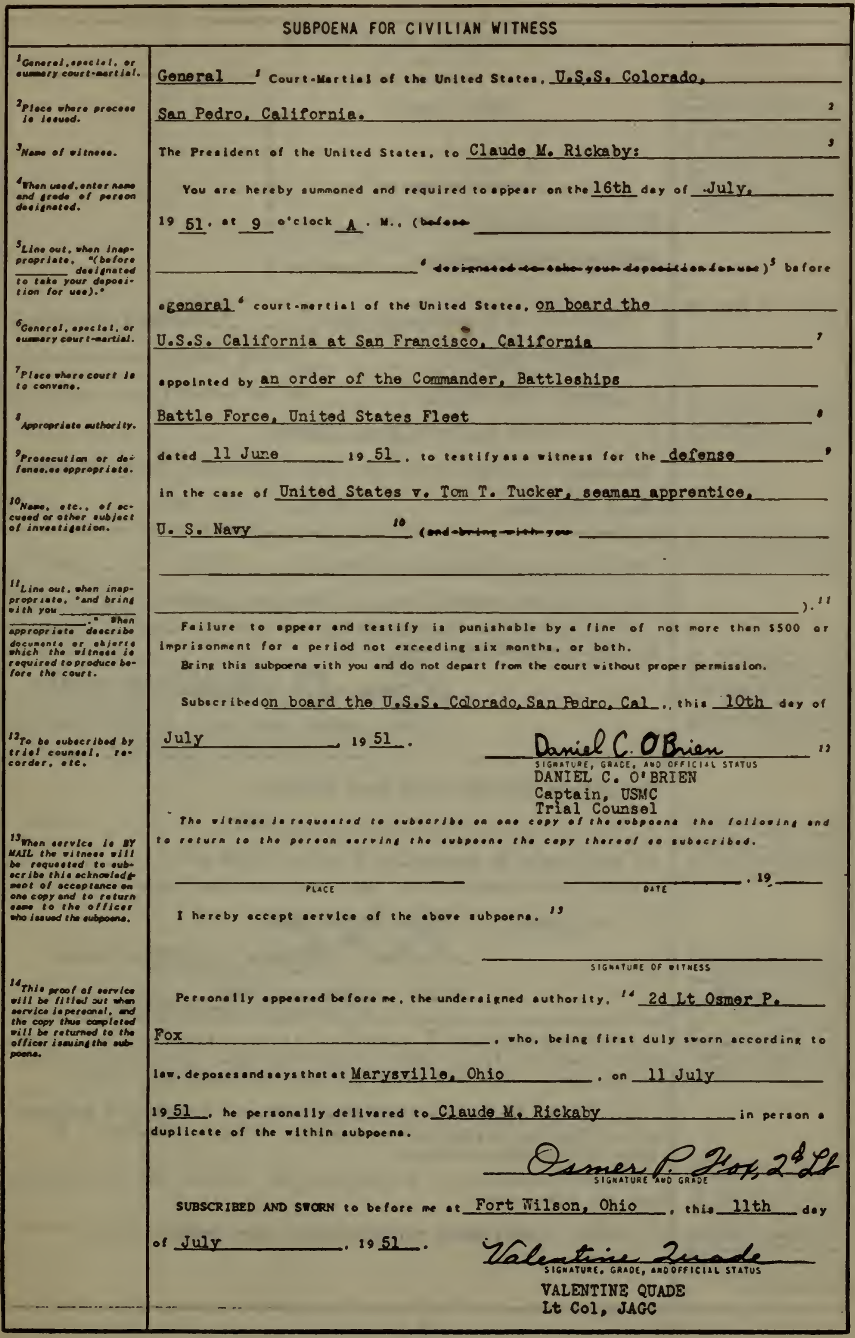
d. ☐ *(State other recommended disposition)*

18. TYPED NAME, RANK, AND ORGANIZATION OF OFFICER EXERCISING SPECIAL COURT-MARTIAL JURISDICTION	DATE 3 Dec 1951
ROBERT G. STRONG, Colonel, 20th Inf, Commanding	SIGNATURE Robert G. Strong

[1] *Applicable only if a preliminary hearing is conducted by an officer other than the officer exercising special court-martial jurisdiction. In appropriate cases, enter "Not applicable."*

[2] *Line out if not applicable.*

Appendix 17



SUBPOENA FOR CIVILIAN WITNESS

General [1] Court-Martial of the United States, U.S.S. Colorado,

San Pedro, California. [2]

The President of the United States, to Claude M. Rickaby: [3]

You are hereby summoned and required to appear on the 16th day of July, 19 51, at 9 o'clock A. M., ~~(before~~ ____________ [4] ~~designated to take your deposition for use~~)[5] before a general [6] court-martial of the United States, on board the U.S.S. California at San Francisco, California [7] appointed by an order of the Commander, Battleships Battle Force, United States Fleet [8] dated 11 June 19 51, to testify as a witness for the defense [9] in the case of United States v. Tom T. Tucker, seaman apprentice, U. S. Navy [10] ~~(and bring with you~~ ____________).[11]

Failure to appear and testify is punishable by a fine of not more than $500 or imprisonment for a period not exceeding six months, or both.

Bring this subpoena with you and do not depart from the court without proper permission.

Subscribed on board the U.S.S. Colorado, San Pedro, Cal., this 10th day of July, 19 51.

Daniel C. O'Brien [12]
SIGNATURE, GRADE, AND OFFICIAL STATUS
DANIEL C. O'BRIEN
Captain, USMC
Trial Counsel

The witness is requested to subscribe on one copy of the subpoena the following and to return to the person serving the subpoena the copy thereof so subscribed.

____________ PLACE ____________ DATE, 19__

I hereby accept service of the above subpoena. [13]

____
SIGNATURE OF WITNESS

Personally appeared before me, the undersigned authority, [14] 2d Lt Osmer P. Fox, who, being first duly sworn according to law, deposes and says that at Marysville, Ohio, on 11 July 19 51, he personally delivered to Claude M. Rickaby in person a duplicate of the within subpoena.

Osmer P. Fox, 2d Lt
SIGNATURE AND GRADE

SUBSCRIBED AND SWORN to before me at Fort Wilson, Ohio, this 11th day of July, 19 51.

Valentine Quade
SIGNATURE, GRADE, AND OFFICIAL STATUS
VALENTINE QUADE
Lt Col, JAGC

[1] *General, special, or summary court-martial.*

[2] *Place where process is issued.*

[3] *Name of witness.*

[4] *When used, enter name and grade of person designated.*

[5] *Line out, when inappropriate, "(before ____________ designated to take your deposition for use)."*

[6] *General, special, or summary court-martial.*

[7] *Place where court is to convene.*

[8] *Appropriate authority.*

[9] *Prosecution or defense, as appropriate.*

[10] *Name, etc., of accused or other subject of investigation.*

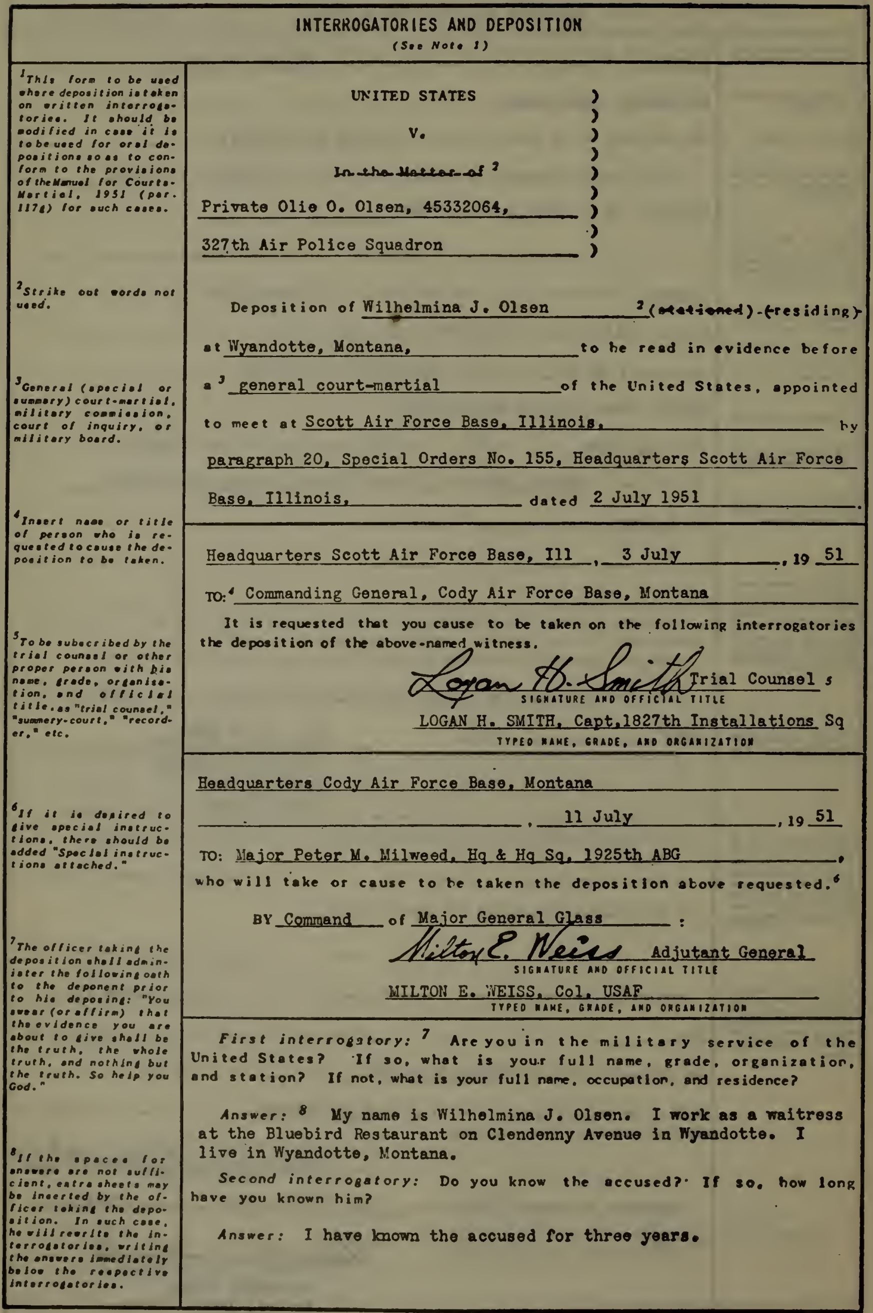
[11] *Line out, when inappropriate, "and bring with you ____________." When appropriate describe documents or objects which the witness is required to produce before the court.*

[12] *To be subscribed by trial counsel, recorder, etc.*

[13] *When service is BY MAIL the witness will be requested to subscribe this acknowledgment of acceptance on one copy and to return same to the officer who issued the subpoena.*

[14] *This proof of service will be filled out when service is personal, and the copy thus completed will be returned to the officer issuing the subpoena.*

Appendix 18



INTERROGATORIES AND DEPOSITION

(See Note 1)

UNITED STATES)
v.)
~~In the Matter of~~ [2])
Private Olie O. Olsen, 45332064,)
327th Air Police Squadron)

Deposition of Wilhelmina J. Olsen [2] (~~stationed~~)-(residing) at Wyandotte, Montana, to be read in evidence before a [3] general court-martial of the United States, appointed to meet at Scott Air Force Base, Illinois, by paragraph 20, Special Orders No. 155, Headquarters Scott Air Force Base, Illinois, dated 2 July 1951.

Headquarters Scott Air Force Base, Ill, 3 July, 19 51

TO:[4] Commanding General, Cody Air Force Base, Montana

It is requested that you cause to be taken on the following interrogatories the deposition of the above-named witness.

Logan H. Smith Trial Counsel [5]
SIGNATURE AND OFFICIAL TITLE
LOGAN H. SMITH, Capt, 1827th Installations Sq
TYPED NAME, GRADE, AND ORGANIZATION

Headquarters Cody Air Force Base, Montana
, 11 July, 19 51

TO: Major Peter M. Milweed, Hq & Hq Sq, 1925th ABG,
who will take or cause to be taken the deposition above requested.[6]

BY Command of Major General Glass:
Milton E. Weiss Adjutant General
SIGNATURE AND OFFICIAL TITLE
MILTON E. WEISS, Col, USAF
TYPED NAME, GRADE, AND ORGANIZATION

First interrogatory: [7] Are you in the military service of the United States? If so, what is your full name, grade, organization, and station? If not, what is your full name, occupation, and residence?

Answer: [8] My name is Wilhelmina J. Olsen. I work as a waitress at the Bluebird Restaurant on Clendenny Avenue in Wyandotte. I live in Wyandotte, Montana.

Second interrogatory: Do you know the accused? If so, how long have you known him?

Answer: I have known the accused for three years.

[1] *This form to be used where deposition is taken on written interrogatories. It should be modified in case it is to be used for oral depositions so as to conform to the provisions of the Manual for Courts-Martial, 1951 (par. 117g) for such cases.*

[2] *Strike out words not used.*

[3] *General (special or summary) court-martial, military commission, court of inquiry, or military board.*

[4] *Insert name or title of person who is requested to cause the deposition to be taken.*

[5] *To be subscribed by the trial counsel or other proper person with his name, grade, organization, and official title, as "trial counsel," "summary-court," "recorder," etc.*

[6] *If it is desired to give special instructions, there should be added "Special instructions attached."*

[7] *The officer taking the deposition shall administer the following oath to the deponent prior to his deposing: "You swear (or affirm) that the evidence you are about to give shall be the truth, the whole truth, and nothing but the truth. So help you God."*

[8] *If the spaces for answers are not sufficient, extra sheets may be inserted by the officer taking the deposition. In such case, he will rewrite the interrogatories, writing the answers immediately below the respective interrogatories.*

Third interrogatory:

Answer:

Fourth interrogatory:

Answer:

First cross-interrogatory:[9]

Answer:

[9] *In case no cross-interrogatories are propounded this fact will be recorded and authenticated by the signature of defense counsel when the deposition is taken by the prosecution, and by the trial counsel when the deposition is taken by the defense, in court-martial cases.*

First interrogatory by the ____________________:[10]

Answer:

Wilhelmina J. Olsen
SIGNATURE OF WITNESS

WILHELMINA J. OLSEN
TYPED NAME OF WITNESS

I certify that the above deposition was duly taken by me, and that the above-named witness, having been first duly sworn by me, gave the foregoing answers to the several interrogatories and subscribed the foregoing deposition in my presence at Wyandotte, Montana, this 16th day of July, 1951.

Peter M. Milweed
SIGNATURE OF PERSON TAKING DEPOSITION

PETER M. MILWEED
TYPED NAME OF PERSON TAKING DEPOSITION

Maj, Hq & Hq Sq, 1925th ABG
GRADE AND ORGANIZATION

Summary Court
OFFICIAL CHARACTER, AS SUMMARY COURT, NOTARY PUBLIC, ETC.

[10] *Insert "court," "commission," or "board," as the case may be.*

3

Appendix 19

WARRANT OF ATTACHMENT

WARRANT OF ATTACHMENT

General Court-Martial of the United States
Fort Wilson, Ohio

UNITED STATES)
v.)
Private John T. Derrick, 35406324,)
Company A, 113th Infantry)

The President of the United States, to Major John A. Gross, 16th Field Artillery Battalion, Fort Thomas, Kentucky:

WHEREAS, Claude M. Rickaby, of Marysville, Ohio, was on the 11th day of July, 19 51, at Marysville, Ohio, duly subpoenaed to appear and attend at Fort Wilson, Ohio, on the 16th day of July, 19 51, at 9 o'clock a.m., before a general court-martial duly appointed by paragraph 17, SO No. 150, Headquarters 50th Infantry Division, dated 11 June, 19 51, to testify on the part of the defense in the above-entitled case; and whereas he has willfully neglected or refused <to appear and attend>[1] (~~to produce documentary evidence which he was legally subpoenaed to produce~~) before said general court-martial, as by said subpoena required, although sufficient time has elapsed for that purpose; and whereas he has offered no valid excuse for his failure to appear; and whereas he is a necessary and material witness in behalf of the defense in the above-entitled case:

NOW, THEREFORE, by virtue of the power vested in me, the undersigned, as *trial counsel of*[2] said general court-martial, by Article 46 of the Uniform Code of Military Justice (50 U.S.C. 621), you are hereby commanded and empowered to apprehend and attach the said Claude M. Rickaby wherever he may be found within the United States, its Territories and possessions, and forthwith bring him before the said general court-martial at Fort Wilson, Ohio, to testify as required by said subpoena.

Nathaniel Edward Brown
NATHANIEL EDWARD BROWN, Capt, Inf
Trial counsel of said[3] general COURT-MARTIAL

Dated at Fort Wilson, Ohio
17 July 19 51

---

[1] *Line out inappropriate words.* [2] *If a summary court-martial, line out the words "trial counsel of" and enter "summary".* [3] *If a summary court-martial, line out the words "Trial counsel of said" and enter "Summary".*

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